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** These transcripts were designated by the parties for inclusion in the record on appeal in the Ninth Circuit, but for some reason do not appear in the record as transmitted to this Court. They are included in this Appendix by mutual consent of the parties, and for the information of the Court.

App. 1

DOCKET ENTRIES

U.S.A. v. David Gelbard, etc.

1971

January 22 - Fld Not of Mot of defts David Gelbard, etc, to quash search warrant; for return of property unlawfully seized (Rule 41, FRC) with affid of Atty Burton Marks in suppt of ord shortening time with copy of search warrant.

Fld (booklet) entitled Petition for Writ of Mandate/Prohibition; Application for temporary stay order pending submission to appellate Panel (FRAP Rule 21)

January 22 - Fld Pltf's oppos & response to Pltf's Mot to quash search warrant; for return of property unlawfully seized and order shortening time with affid of Robert S. Thaller, Atty in suppt.

January 25 - Hrg: Deft mot to quash search warrant. Court & cnsl confer. On mot of cnsl - Court ords hearing cont to 2/1/71, 1:30 pm bef (DWW)

February 8 - Fld Ord (EC) to show cause why David Gelbard Should Not be held in contempt.

February 11 - Fld Memo of pts & auths in oppos to order to show cause re contempt as to deft David Gelbard

February 12 - Fld Govt's Memo in Opposition to Furnishing Witnesses Transcripts of The Intercepted Conversations Prior to the Witnesses' appearance before the Grand Jury.

February 1 - Cnsl submit mot & Ct ords motn denied, to quash deft's search warr, & for retn of property unlawfully seized.

February 22 - Fld NOTICE OF APPEAL as to deft David Gelbard appealing from certain order made 2/17/71, by (EC) holding witness in contempt of Court for failure to answer questions bef the Grand Jury. Issd copies (EC-Cr. Duty Judge), U. S, Atty, U. S. Mars, P/O, deft & deft's cnsl, File, Admt Clerk. Paid $5.00 flg fee.

February 22 - Fld stip designation of Record (on Appeal) as to deft David Gelbard. Issd copy to U. S. Atty.

February 17 - Cnsl argue mot to Ct. Ct rules that matters are not to be litigated bef the G/J and are not appropriate bef this Ct at this time. Ct fur rules that Rights of parties are sufficiently protected & appear that the statute is Constitutional. Wits is ord by Ct to appear bef the G/J & ans questions propounded or he will be held in contempt of Court. Wits advised that he still has the right to express the 5th amendment privilege. (EC)

February 17 - Hrg: the Govt cnsl state wits refused to testify bef G/J. Ct reptr Nancy Long CST, & reads questions propounded to wits. Ct ords wits to ans questions. Wits refuses to and questions. Ct finds wits in contempt of Court & ord wits committd to custy of A/G until question answered or as long as life of G/J, which ever is shorter. Mot by cnsl for stay of exec of commitmt until 12 noon on 2/23/71. Ct grants mot & ords wits to surr to U.S. Mars on that date & time or bench warrant will issue for his arrest. (EAC)

U.S.A. v. Sidney Parnas

1971

*February 12 - Fld Govt's Memo in Opposition to Furnishing Witnesses Transcripts of Their Intercepted Conversations Prior to The Witnesses' appearance before the Grand Jury. (EC)

February 16 - Fld Memo of Law re Rights of Witness Sidney Parnas under the So-Called "Wiretap Statute," Title 18/2510 Et Seq. USC, w/exhibits attached.

*February 10 - Hrg: Ent procs, Ct & cnsl confer. Mot by govt to compel testimony of witness Parnas. Wits moves Ct for cont for hrg. Ct grants mot & Ords hrg cont to 2/17/71, 9 am. All pts & auths to be fld by 2/16/71 at noon, by wits. Govt to file pts & auths by 2/12/71, 12 noon. (EC)

February 28 - Fld NOTICE OF APPEAL of Sidney Parnas appealing from order of (EC) entered in this action on 2/17/71, holding the deft in civil contempt of the Court and committed into custody of U. S. Attorney General until he purge himself of the contempt by appearing bef the Thompson Federal Grand Jury in Los Angeles, Calif. Issd copies (EC), U. S. Atty, U. S. Mars, P/O, deft & deft's cnsl File, Adm Clerk, Appeals Clerk. Paid $5.00 flg fee for flg Notice of Appeal.

February 22 - Fld stipulated designation of record on appeal. Oris & lay given to Davis

February 17 - Hrg in matter of Sidney Parnas: Cnsl argue mot to Ct. Ct rules that matters are not to be litigated bef G/J & are not appropriate bef this Ct at this time. Ct fur rules that Rights of parties are sufficiently protected & appears statute is Constitutional. Wits is ord by Ct to appear bef G/J & ans questions propounded or he will be held in contempt of Ct. Wits advised that he still has the right to express 5th amendment privilege. (EAC)

February 17 - Hrg: Govt cnsl state wits has refused to testify bef G/J. Ct reptr Nancy Long CST & reads questions propounded to wits. Ct irds wits to answer questions. Wits refuses to ans. Ct finds wits in contempt of Ct & ord wits committed to custy A/G until questions are ans or as long as the life of the G/J, which ever is shorter. Mot by cnsl for stay of exec of commitmt until 12 noon 2/23/72. Wits to surr to U.S. Mars on that date. Ct grants wits to surr on that date & time or bench warr will for his arrest. (EAC)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, v. DAVID GELBARD and David Gelbard Residence, a green stucco, one-story, single family dwelling located at 6681 Maryland Drive, Los Angeles, Calif., and depicted in the attached photographs, Defendants	Alphabetical File MISC No. 2636 Commissioner's Docket #112 Case Numbers 311 and 330

NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure).

[Filed January 8, 1971]

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND THE UNITED STATES OF AMERICA AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that on January 25, 1971, at the hour of 9:30 A.M., in the courtroom of the Honorable David W. Williams, located in the Federal Courthouse, Temple and Spring Streets, Los Angeles, California, a motion will be made and is hereby made to quash search warrants numbered 311 and 330, copies of which are attached hereto as exhibits, and to return all property seized as a result of said search warrants.

These motions will be based upon the following grounds under the Fourth Amendment to the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure:

1. That the affidavits upon which the search warrants were premised (copies of which have been withheld from the moving party) were insufficient on their face to support the issuance of a search warrant.

2. The warrants on their face are general search warrants and void.

3. The articles seized allegedly pursuant to said search warrants were not properly seized and not particularized in the search warrants.

4. That the method of searching the house and the entry thereto was in violation of the United States Constitution and the laws of the United States of America.

5. That if the affidavits in support of these search warrants are valid on their face, that the evidence obtained to support the probable cause stated in said affidavit or affidavits was obtained as a result of a tap of Mr. Gelbard's telephone, whicff said tap was unlawful search and seizure under the Fourth Amendment to the United States Constitution for all of the reasons above enumerated as to the reasons for the defective affidavits in support of these search warrants. (*Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1966).)

These motions will be based upon the affidavits in support of the search warrants, the evidence oral and documentary as shall be produced at the hearing of these motions, and such Points and Authorities as shall be supplied to the Court in support of these motions at the time of the hearing.

DATED: January 6, 1971.

MARKS, SHERMAN & LONDON
A Professional Corporation

AFFIDAVIT OF BURTON MARKS IN SUPPORT OF ORDER SHORTENING TIME

STATE OF CALIFORNIA)
: ss.
COUNTY OF LOS ANGELES)

BURTON MARKS, deposes and says:

I am an attorney at law duly authorized to practice law before all the Courts of this State and before this Honorable Court, and am a partner in the law firm of Marks, Sherman & London, a Professional Corporation, and one of the attorneys for David Gelbard, the moving party herein.

That on or about December 12, 1970, a search was made of the house of David Gelbard. Various items were recovered as set forth in the return to the search warrants, copies of said returns are attached hereto as exhibits.

Declarant is informed and believes and thereon alleges that the affidavits in support of the issuance of the search warrants were insufficient as a matter of law to establish probable cause for the issuance of the search warrants. Your declarant has been unable to see the said affidavits for reasons best known to the Government, not this declarant.

That an order shortening time to challenge the unlawful seizure of declarant's client's personal property is necessary because Mr. Gelbard has been subpoenaed to appear before the Grand Jury in this case on January 13, 1971 at 10:00 AM (a copy of said subpoena is attached hereto as an exhibit to this affidavit) and declarant is informed and believes and thereon alleges that the office of the United States Attorney intends to and will question Mr. Gelbard about items recovered from his home, which said items were unlawfully seized as aforesaid, and the Fourth Amendment to the United States Constitution prohibits the use of unlawfully seized evidence "for any purpose whatsoever" (*Fahy v. Connecticut*, 375 U.S. 85 (1963)).

Your declarant is further informed and believes and thereon alleges that much of the evidence obtained for the affidavits in support of the search warrants issued for the search of Mr. Gelbard's residence was obtained through the use or issuance of another "telephonic search warrant" or "telephone tap" and that such search warrants and the underlying affidavits were unconstitutional and void and not based on any probable cause which would be sufficient to unlawfully issue such a telephone tap or search warrant. That declarant has no access to said "tap search warrants nor to the underlying supporting affidavits.

WHEREFORE, your declarant respectfully prays that the order shortening time attached hereto issue from this Court so that a hearing may be had on the motions on the date set forth in the moving papers.

Dated: January 6, 1970.

Form A. O. 93 (Revised Oct. 1953) Search Warrant

United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

Commissioner's Docket No. 12

Case No. 317

UNITED STATES OF AMERICA

v.

DAVID GELBARD

SEARCH WARRANT

To ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION

Affidavit having been made before me by Vance A. Duffy

that he {has reason to believe / suspects} that {on the person of / on the premises known as}

David Gelbard, 6681 Maryland Drive, Los Angeles, California

in the Central District of California

there is now being concealed certain property, namely line sheets; results of sporting events; odds; bet slips; records of wagering accounts and settlements; lists of bettors; telephone numbers; names; symbols and codes for bettors; currency and negotiable instruments; and other types of bookmaking records and wagering paraphernalia.

which are the fruits, instrumentalities and/or evidence of a violation o

Sections 371, 1952 and 1084 of United States Code, Title 18.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the {person / premises} above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the {person / premises} named for the property specified, serving this warrant and making the search {in the daytime / at any time in the day or night} and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 11th day of December, 19 70.

11:45 P.M.

THOMAS R. BARRY

U. S. Commissioner

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App. 9

United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

vs.

Commissioner's Docket No. 12

Case No. 336

David Gelbard Residence, a green stucco one-story, single family dwelling located at 6681 Maryland Drive, Los Angeles, California, and depicted in the attached photographs.

SEARCH WARRANT

To ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION

Affidavit having been made before me by Vance A. Duffy, Special Agent, Federal Bureau of Investigation

that he { has reason to believe } that { ~~xxxxxxxxxxxx~~ on the premises known as } David Gelbard Residence, a green stucco one-story, single family dwelling located at 6681 Maryland Drive, Los Angeles, California, and depicted in the attached photographs, and contents therein, and including rooms, closets, cabinets, enclosures and safes therein, and the persons of any individuals found therein

in the Central District of California

there is now being concealed certain property, namely line sheets; results of sporting events; odds; bet slips; records of wagering accounts and settlements; lists of bettors; telephone numbers; symbols and codes for bettors; telephones; adding machines; currency and negotiable instruments; and other types of bookmaking records and wagering paraphernalia.

which are the fruits, instrumentalities and/or evidence of a violation
[have given affiant grounds for search and seizure]
of Sections 371, 1952 and 1084 of United States Code, Title 18.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the { ~~xxxxx~~ premises } above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the { ~~xxxxx~~ place } named for the property specified, serving this warrant and making the search { in the daytime. ~~xxxxxxxxxxxxxxxxxxxxxx~~ } and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 11th day of December, 1970

Richard J. Ss U.S.

Warren A. Ferguson
U.S.C.

1. FIVE PIECES OF PAPER AND ONE ENVELOPE WITH NUMEROUS NOTATIONS THEREON.

2. RED TELEPHONE DIRECTORY LABELED W. B. CLASSICK Co.

3. TWO SHEETS WITH GRID, WITH NAMES OF TENNIS AND PLUS & MINUS FIGURES.

4. WHITE BOOK WITH A FEW YELLOW PAPER. BOOK LABELED VISTA DEL MAR, CHILD-CARE SERVICE, 1970 CALENDAR AND APPOINTMENT BOOK.

5. BLUE BOOK LABELED APPOINTMENTS 1970."

This is to certify that on DECEMBER 12, 1970 at Los Angeles, Calif., Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice, at the time of conducting a search of my person and/or the premises at 6681 Hillegrand Dr. obtained the items listed above on this page and 1 other pages. I further certify that the above represents all that was obtained by Special Agents of the Federal Bureau of Investigation, U. S. Department of Justice.

(SIGNED) [signature]

Witnessed:

[signature]
Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

[signature]
Special Agent
Federal Bureau of Investigation
U. S. Department of Justice

P. 2 of 3

6. LETTER ADDRESSED TO DAVID GELBARD FROM AETNA INSURANCE CO. DATED 6/18/87. NUMEROUS NOTATIONS IN BLUE INK ON PAPER.

7. SMALL SLIP OF PAPER WITH NAME, "WILLIAM H. NORDELL, 1843 LAKE STREET, GLENDALE, CALIFORNIA 91201, 242-1875," WRITTEN THEREON.

8. ENVELOPE ADDRESSED TO DAVE GELBARD FROM ARTHUR SHERMAN ATTORNEY WITH NUMEROUS NOTATIONS.

9. BROWN DIARY LABELED "COURTESY OF LASCCO BRAND."

10. BROWN ADDRESS BOOK.

11. WOMAN'S RAIN SHOE CONTAINING $662.00 IN 50'S, 20'S, 10'S, 5'S AND 1'S IN U.S. CURRENCY. SAID $662.00 returned.

p. 3 of 3

12. $210.00 in $50's and 10's in U.S. currency located in woman's dress in Mother Clout.

13. $384.00 in U.S. currency and Check in amount of $11.80 made on Franklin National Bank payable to order of Leo Fishman, 2548 Cancliff St., Ft. Check # CT, 133520, dated - 12/2/70, and numerous slips of paper with notations.

14. Five pieces of paper with various notations

15. Vol. 7, No. 15 of J.K. Sports Journal, Games ending Sunday 12/2-/70.

16. Two type written paper sheets with teams listed with + and - figures.

1

AO Form No. 110 (Rev. 5-60) Subpoena To Testify Before Grand Jury

United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

To David Colbard
6681 Maryland Drive
Los Angeles, California

You are hereby commanded to appear in the United States District Court for the Central District of California at Rm. 1346, U. S. Courthouse, 312 No. Spring Street in the city of Los Angeles on the 13th day of January 19 71 at 10:00 o'clock A. M. to testify before the Grand Jury ~~concerning violations~~.

This subpoena is issued on application of the United States.

WILLIAM MATTHEW BYRNE, JR.
United States Attorney
ALFRED H. KING
Special Attorney, Dept. of Justice
Telephone: (213) 688-5808

Date December 11, 1970

SHERRY G. HARTMAN, Clerk

By TERRI STORMS, Deputy Clerk

1. Unless the words "and bring with you" appear the subpoena is to require the appearance of witnesses or parties only, in which case the clause need not be completed or the blank space provided for item 2 filled.

RETURN

Received this subpoena at on and on at I served it on the within named by delivering a copy to h

Date , 19

By

Service Fees
Travel $
Services
Total $

AFFIDAVIT OF PERSONAL SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am and was on the dates herein mentioned over the age of 18 years and not a party to this action; I served the NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure) in this action by personally delivering to and leaving with the following person at the County of Los Angeles, State of California, on the date set opposite their respective names, a true copy thereof, to wit:

Martha Schofield
a person authorized to accept service on behalf of the United States Attorney General — 312 N. Spring St. Los Angeles, Calif. 1/8/71

DATED: January 8, 1971.

Robert C. Hayman

Subscribed and Sworn to Before Me this Date.

Notary Public

OFFICIAL SEAL
[illegible] CUTLER

ACKNOWLEDGMENT OF SERVICE

This will acknowledge service of a copy of NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure) this date.

DATED: January 8, 1971.

Office of the U.S. Attorney
General

OPPOSITION AND RESPONSE TO PLAINTIFF'S MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED; and ORDER SHORTENING TIME

[Filed January 22, 1971]

Defendant, United States of America, hereby opposes and responds to the motions filed on behalf of Plaintiff David Gelbard. Said opposition is based on the files and records of this case, as well as the attached affidavit.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

AFFIDAVIT OF ROBERT S. THALLER

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ROBERT S. THALLER being duly sworn, states the following:

1. I am an attorney employed by the Organized Crime and Racketeering Section, U. S. Department of Justice.

2. I am conducting the investigation for which Mr. Gelbard has been subpoenaed to appear before the grand jury and for which a search warrant was executed on his property.

3. The search of Mr. Gelbard's residence was executed under lawful warrant on December 12, 1970 with probable cause being determined to exist by U. S. Commissioner Thomas R. Berry.

4. To my knowledge, all information resulting from wiretaps, mentioned in the affidavit in support of the search

warrant was obtained from wiretaps conducted pursuant to Court order as provided in 18 U.S.C. 2518.

5. That Mr. Gelbard's telephone was not the subject of any such order or application for such.

6. To my knowledge David Gelbard is not a subject of process in this Court other than the subpoena before the Grand Jury for February 3, 1971 and the subject search warrant.

7. No reason appears why David Gelbard cannot fully protect his rights before the grand jury by either testifying truthfully or asserting his right under the Fifth Amendment to the U. S. Constitution not to incriminate himself.

CRIMINAL MINUTES - GENERAL

Case No. 2636-MISC. Date Feb. 1, 1971

DOCKET ENTRY: Couns submit mot and Ct ords mot DENIED.

PROCEEDINGS: HEARING: Defendant's motion to quash search warrant; and for return of property unlawfully seized.

MOTION FOR ORDER TO SHOW CAUSE WHY DAVID GELBARD SHOULD NOT BE HELD IN CONTEMPT

[Filed February 5, 1971]

Plaintiff, United States of America, hereby moves the Court for an Order to Show Cause why David Gelbard should not be held in civil or criminal contempt for failure to appear before a federal Grand Jury of the Central District of California (Thompson Grand Jury) on February 3, 1971, pursuant to subpoena, and as grounds therefor,

attaches hereto the affidavit of Robert S. Thaller, Special Attorney, U. S. Department of Justice.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

AFFIDAVIT OF ROBERT S. THALLER

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

ROBERT S. THALLER being duly sworn, states the following:

1. That I am a Special Attorney for the U.S. Department of Justice, Organized Crime & Racketeering Section.

2. That I am currently assisting the United States Grand Jury for the Central District of California at Los Angeles (Thompson Grand Jury) in a criminal investigation of possible violations of 18 USC 1952 (ITAR) and 18 USC 1084 (Interstate transmission of wagering information).

3. On December 12, 1970 I caused a subpoena to be served upon David Gelbard commanding his appearance to testify before the Thompson Grand Jury in Los Angeles on January 13, 1971 at 9:30 A.M.

4. Subsequently, I notified Burton Marks, counsel for David Gelbard, that Gelbard's appearance had been continued to February 3, 1971 and for Mr. Mark's convenience the time was set for 10:30 A.M. or shortly thereafter.

5. A few moments before David Gelbard's scheduled appearance before the Thompson Grand Jury, Mr. Mark's informed me that because the Government had not furnished his client with transcripts of his conversations which were overheard by electronic surveillance he was instructing

David Gelbard not to answer any questions before the Grand Jury.

6. That when the time for his appearance came, David Gelbard entered the Grand Jury chamber but refused to be administered the oath by the foreman or answer any questions. His only response was that his attorney had instructed him to refuse to take an oath and to refuse to answer any questions.

7. That David Gelbard was overheard in telephone conversations that were being electronically surveilled pursuant to an order of the District Court, Central District of California.

ORDER TO SHOW CAUSE WHY DAVID GELBARD SHOULD NOT BE HELD IN CONTEMPT

[Filed February 8, 1971]

IT IS HEREBY ORDERED that David Gelbard appear before this Court and show cause as to why he should not be held in civil or criminal contempt for failure to testify before a federal Grand Jury of the Central District of California on February 3, 1971, pursuant to subpoena.

IT IS FURTHER ORDERED that hearing on this Order to Show Cause shall be held on Wednesday, February 17, 1971, at 9:00 A.M., before this Court, and David Gelbard is hereby ordered to be present with his counsel at that time.

DATED: February 8, 1971

E. AVERY CRARY
UNITED STATES DISTRICT JUDGE

CRIMINAL MINUTES – GENERAL

Case No. 2658 Date Feb 10, 1971

DOCKET ENTRY: Hrg: ent procs, Ct & cnsl confer. Mot by govt to compel testimony of witness Parnas. Witness moves ct for cont of hrg. Ct grants mot & ords Hrg cont to 2/17/71 at 9 am. All pts & auths to be fld by 2/16/71 at noon, by wit. Govt to file pts & auths by 2/12/71 at 12 noon. (EAC)

PROCEEDINGS: Government makes motion to the Court to compel the witness to answer questions before the Grand Jury. Court and counsel confer. Witness makes motion for continuance of hearing. Court grants motion and orders hearing continued to 2/17/71 at 9 am. Government to file all briefs by 2/12/71. Witness to have all briefs filed by noon on 2/16/71.

MEMORANDUM OF POINTS AND AUTHORITIES OPPOSITION TO ORDER TO SHOW CAUSE RE CONTEMPT.

[Filed February 11, 1971]

PRELIMINARY

Although the proceedings before the Court are not literally a "contempt" because there has been no order of a "court" which has been disobeyed, respondent, through his attorney, is willing to stipulate to certain preliminary facts so that the issues upon which the Court should rule can be decided in the context of an adversary proceeding.

We, therefore, presume for the purpose of the following argument that Mr. Gelbard refuses to be sworn and testify as a witness until he can be provided transcripts of any telephone intercept under the provisions of 18 U.S.C. § 2514, et seq.; and, in any event, that although he might "testify," there is no requirement that he testify under oath.

ISSUES

Respondent Gelbard contends that so long as it is the intention of the United States Attorney's Office and/or the Grand Jury to utilize evidence obtained through a wiretap, that any order of the Court requiring such testimony would be an unlawful order and, therefore, not the subject of a contempt proceeding on one or more of the following grounds:

1. That the statute authorizing wiretaps is unconstitutional and void in violation of Amendments I, IV, V to the United States Constitution.

2. That a Grand Jury proceeding is a "hearing" which entitles the witness to have a transcript of any conversation he may have had on the telephone which was intercepted by the Government through Court order.

3. That insofar as the witness Gelbard had his telephone "tapped" even though he was merely talking to another party whose telephone was in fact the subject of a wiretap or telephone was in faot the subject of a wiretap or telephone intercept, that the Government may not use the information obtained for any purpose whatsoever until an opportunity is given to challenge the validity of the telephone intercept, i.e., "traverse" the search warrant either pursuant to rule 41 or § 2518.

4. That notwithstanding all of the above, no rule of Court or law of the United States requires that a witness testify under oath before a Grand Jury or any Court tribunal and any order to be sworn in would be an invalid order.

ARGUMENTS AND POINTS AND AUTHORITIES

Attached are the points and authorities in support of moving papers submitted on behalf of Gelbard. They are incorporated herein as though fully set forth at length as are the points and authorities in the case of *U.S.A. v. Blott*, 70-143-Cr-TC, United States District Court, Southern Dis-

trict of California, which are also incorporated herein as though fully set forth at length.

In support of the First Amendment argument, it is submitted that a wiretap in any form as permitted here under the authority of *Blount v. Rizzi*, U.S. Supreme Court Docket No. 55 and 58, decided January 14, 1971, a copy of which is attached hereto for the Court's consideration, is authority for the proposition that to permit a wiretap or interception of any form puts a chill on the exercise of free speech because of the fear of a person using a telephone that he might be overheard by the Government . . . and that the use of a telephone, just like the use of the mails, is as much a part of speech as is one's tongue. The case of *Castro v. Superior Court*, 9 Cal. App.3d 675 (1970), and the authorities cited therein by Justice Kaus, are persuasive that the extent of permissible telephone interception to both innocent and "guilty" conversations vitally restricts the use of the telephone and is a prior restraint on free speech.

DATED: February 11, 1971.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID GELBARD, Petitioner, v. Honorable Albert Lee Stephens, Jr., Chief Judge, Honorable David W. Williams, Judge, United States District Court Central District of California; John N. Mitchell, Attorney General for the United States; and Robert Meyer, United States Attorney for the Central District of California, Respondents	NO._____ (Court below: MISC NO._____ Commissioner's Docket No. 112 Case nos 311 and 330

APPLICATION FOR A STAY ORDER

TO ANY JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

This is an Application for Temporary Restraining Order restraining the Respondents MITCHELL and MEYER, their agents, servants and employees from conducting any proceedings in the Grand Jury or any hearing wherein evidence which has been seized has not been previously determined to be or have been unlawfully seized and further asks for an order restraining the Respondent Judges from permitting the conducting of any Grand Jury proceedings or the answering of any questions by Petitioner in any Grand Jury proceedings wherein it is ascertained that the Grand Jury proceedings are being conducted as a furtherance of investigation of materials obtained through the use of telephonic tap search warrants and/or ordinary search warrants, the affidavits of which are based on said telephonic search warrants such as in the case of Petitioner herein.

This Application is based upon the verified Petition for Writ of Mandate/Prohibition filed herein and the points and authorities and affidavits in support of said Petition and is premised on the fact that the ordinary rules of this Court requiring submission of such application to a panel cannot be timely complied with because of the eminence of a proceeding before the Grand Jury on January 13, 1971 where the Petitioner herein has been subpoenaed as a witness after his telephone has been tapped and his house searched, and where he has had no opportunity to have recourse to the Courts to challenge.

DATED: January 11, 1971.

MARKS, SHERMAN & LONDON
A Professional Corporation

PETITION FOR WRIT OF MANDATE/PROHIBITION

TO THE HONORABLE COURT OF APPEALS FOR THE NINTH CIRCUIT AND ANY PANEL THEREOF:

This is an Application for a Writ of Mandate/Prohibition under Federal Rules of Appellate Procedure, Rule 21, which the following relief is requested:

A. To restrain the Department of Justice and its agents and/or the United States Attorney's Office from utilizing evidence in Grand Jury proceedings or any proceeding whi evidence has been seized through search warrants based on telephone taps, or otherwise, prior to an opportunity being given to the Petitioner or any other person similarly situated to challenge the validity of the seizures, the enabling statute (18 USC § 2518) and the search warrants; and

B. To restrain Respondent Court prohibitive from permitting the conducting of a Grand Jury proceeding or hearing wherein such evidence is contemplated to be used and which is being used in direct violation of the explicit pro-

visions of 18 USC § 2518, irrespective of the validity of that Section or the validity of the searches and seizures.

In support of this joint Writ, Petitioner alleges:

1. That he is a citizen of the United States and resides at 6681 Maryland Drive, Los Angeles, California.

2. That on or about December 12, 1970, Petitioner's person and house were searched pursuant to a search warrant bearing Commissioner's Docket No. 112, Case Numbers 311 and 330, and that these search warrants were based upon an affidavit filed with the Commissioner.

3. That the affidavit in support of search warrants 311 and 330 states on its face tht information obtained to establish "probable cause" for the issuance of search warrants 311 and 330 was a result of a telephone interception by the United States District Court Central District of California under the provisions of 18 USC § 2518.

4. That Petitioner has been subpoenaed to appear before the Grand Jury, United States District Court for the Central District of California on January 13, 1971 at 10:00 AM to testify before said Grand Jury and that said Grand Jury investigation is being conducted jointly by the United States Attorney's Office through Respondent ROBERT MEYER and the Department of Justice under the authority of Respondent JOHN N. MITCHELL and that each of the said Respondents intends to and will utilize evidence obtained as a result of the search warrants and telephone taps.

5. That Petitioner has attempted to file a motion to suppress evidence to challenge the validity of the search warrants under rule 41 of the Federal Rules of Criminal Procedure and through his attorney attempted to obtain an order shortening time so that such motions could be heard at 2:00 PM on January 11, 1971 in front of the Honorable David W. Williams; that said application for an order shortening time was denied by the Honorable David W. Williams (see affidavit of Burton Marks attached); as a consequence

the motions had to be noticed as of January 25, 1971 at 9:30 AM after the proposed Grand Jury hearings are to be heard.

6. That Respondents MITCHELL and MEYER, their agents, servants and employees have refused to and continue to refuse to disclose to Petitioner or his attorneys the contents of the wire taps and/or the contents of the affidavits issued in support of said wire taps, and Petitioner is informed and believes and thereon alleges that the affidavits in support of said wire taps others have been ordered sealed by a Judge or Judges of the United States District Court.

7. Affiant is informed and believes and thereon alleges that Respondents HONORABLE ALBERT LEE STEPHENS, JR., CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA and Respondent DAVID W. WILLIAMS Judge for said Court, have, by their failure to permit the disclosure of affidavits in support of the wire taps or wire tap communications and/or ordered the sealing of said wire taps and/or by refusing to permit hearings on the validity of the search warrants prior to the hearing of the Grand Jury have violated the express provisions of 18 USC § 2518 which provides that:

> "(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a federal or state court unless each party, not less than ten days before the trial, hearing or proceeding, has been furnished with a copy of the court order and accompanying application under which the interception was authorized or approved."

8. That sub-section 10 of Title 18 USC § 2518 permits an aggrieved person to challenge the validity of the wire tap. This contemplates a challenge prior to any "hearing" but nevertheless, this opportunity has been denied to Petitioner.

9. That Title 18 USC § 2518 is unconstitutional and void in violation of Amendments One, Four, Five, Six and Nine

to the United States Constitution in one or more of the following respects, as a consequence any evidence obtained as a result of an order under said unconstitutional statute is void. The evidence cannot be used for any purpose whatsoever (*Fahy v. Connecticut*, 375 U.S. 85 (1963)) for the following reasons:

1. Said statute is overbroad and has a "chilling" effect upon the exercise of free speech over the telephone and is an unconstitutional prior restraint.

2. That the statute on its face and/or as applied herein permits such a lack of specificy in the issuance of a wire tap that it allows for "general" search warrants.

3. Said statute permits governmental intrusion into individuals' right to privacy.

4. The statute fails to provide for an immediate hearing, as soon as the wire tap is completed, with notice to the person whose conversation has been intercepted and whose property has been seized to challenge the validity of the wire tap and an opportunity to have his property and/or words returned.

5. The search of Petitioner's house was invalid and in violation of Amendments Four, Five and Six to the United States Constitution in that there was no probable cause for the issuance of said search warrants; that the underlying probable cause, if any obtained was obtained as a result of an unlawful wire tap secured without probable cause and predicated upon a void statute.

Petitioner has no plain, speedy or adequate remedy at law other than by this Petition for Writ of Mandate/Prohibition to protect his rights guaranteed under the Constitutional provisions hereinabove stated.

WHEREFORE, Petitioner respectfully prays that a Writ of Mandate/Prohibition issue as applicable directed to the Respondents (and that a temporary stay order first issue to the urgency of the situation pending the hearing on this matter) restraining the Respondents MITCHELL and MEYER

from conducting any proceedings wherein suspect evidence may or is being contemplated is used for investigation purposes where such evidence was obtained as a result of a wire tap and/or search warrants after wire tap has been obtained and where the Petitioner is a party to these proceedings or suspected to be a party to these proceedings before a hearing is afforded to Petitioner to challenge the validity of the searches and telephone taps and that all applications for the telephone taps be made available to the Petitioner or his attorneys.

Petitioner further prays that the Respondent Judges be restrained from permitting Grand Juries to proceed to investigate any matters whatsoever wherein it is contemplated that evidence seized as a result directly or indirectly of wire tap on Petitioner's telephone is to be used in the process of investigation until the Petitioner is first afforded an opportunity to have a full hearing to challenge the validity of the searches and seizures and/or the validity of 18 USC § 2518.

In the alternative this Petitioner prays that this Court declare Title 18, USC § 2518 to be null, nugatory, void and unconstitutional in violation of Amendments One, Four, Five, Six and Nine to the United States Constitution for the reasons set forth in the points and authorities in support of this Petition and order the Respondents MITCHELL and MEYER to surrender up to Petitioner and others who may be similarly situated all materials, evidence, investigation of any manner whatsoever which have been obtained by and through the use of said telephone taps or wire interceptions under the auspices of said statute.

DATED: January 11, 1971.

AFFIDAVIT OF BURTON MARKS IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND FOR STAY ORDER

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

BURTON MARKS, being duly sworn, deposes and says:

That he is an attorney at law duly authorized to practice before all the Courts of this State and before the United States District Court for the Central and Southern Districts of California and before this Honorable Court; that he is one of the attorneys for Petitioner David Gelbard and if called and sworn could competently testify to the facts as hereinafter stated.

That Petitioner David Gelbard has been subpoenaed to appear before a Grand Jury panel in the Central District of California on January 13, 1971 at the hour of 10:00 A.M. That these Grand Jury proceedings are being conducted, to the best information that this Affiant has, by the United States Department of Justice through its special "strike force" which has been organized, at least ostensibly, for the purpose of combating "orgaized crime."

Affiant is further informed and believes and thereon alleges that the said "strike force" has, for the past several months, been investigating bookmaking activities in and about the Los Angeles area, and throughout the country and in furtherance of this investigation did assist agents of the Federal Bureau of Investigation in obtaining "wire tap" search warrants and ordinary garden variety search warrants for the purpose of obtaining evidence in furtherance of these investigations. That in fact the search warrant was issued for the search of Petitioner's house andsperson on the 11th day of December, 1970.

Affiant has had an opportunity to examine the affidavit in support of the search warrant which is quite lengthy, and in the opinion of Affiant who has practiced in the area of

criminal and constitutional law for the past fifteen years, said affidavit in support of said search warrant is legally insufficient and deficient. Said affidavit constantly refers to information which was obtained by the Affiant in that affidavit as a result of a prior wire tap. Affiant has been unable to obtain the affidavits in support of the search warrant issued to tap the telephones of Affiant's client, and therefore cannot make any particular statements as to the sufficiency of said affidavits; except that it is the opinion of this Affiant that the statute authorizing the issuance of broad exploratory search warrants is in itself unconstitutional and void in violation of Amendments One, Four, Five and Nine to the United States Constitution, and that consequently the affidavits in support of a broad search warrant must necessarily, of themselves be so broad as to be constitutionally deficient and lacking in probable cause.

Based upon these conclusions and based upon the research and points and authorities which are attached hereto and made a part of this petition, and upon the facts as hereinafter set forth regarding the activities of the United States Government and its officers and employees, Affiant is of the opinion that it is and has been at all times the intention of the representatives of the United States Government, to wit: the Department of Justice and its agents and employees and the Federal Bureau of Investigation and its agents and employees, to utilize the evidence obtained through the use of ordinary and telephone tap search warrants to conduct or assist in the conducting of a Grand Jury investigations and inquiries, and it is further their intention to utilize this evidence to pin-point questions to be asked of the various witnesses including Petitioner herein. Affiant is also of the opinion and based upon the foregoing that there is a substantial probability that the evidence obtained by the United States Government through the use of the telephonic tap search warrants and consequently the ordinary search warrants is evidence obtained in violation of the mandates of the United States Constitution and that therefore said evidence cannot be used in a Grand Jury proceed-

ing or for any purpose whatsoever . . . and such evidence should be returned to its rightful owners forthwith along with any copies made thereof and/or any notes or documentation made as a result of said unlawful search.

That on or about January 6, 1971, Affiant presented to the Clerk for the United States District Court for the Central District of California a document entitled "NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure); and ORDER SHORTENING TIME." A copy of said moving papers is attached to this Petition and marked as an Exhibit and incorporated in this Affidavit as though fully set forth at length. Within the body of the moving papers it was requested that a hearing be had on January 11, 1971 to determine the validity of the warrant or warrants used for the purpose of securing evidence against the Petitioner herein, and request was made for an order shortening time.

On January 7, 1971, at approximately 9:00 AM, a conference was had in the chambers of the Honorable David W. Williams, who is presently the "master calendar" judge in charge of the Grand Jury panel with your affiant present and Mr. Michael A. DeFeo and also an assistant United States attorney whose name Affiant cannot recall at this particular moment. At that time Affiant expressed to the Court the proposition that the Grand Jury proceedings could not be conducted wherein questions were directed toward evidence unlawfully seized and that it was therefore imperative that a early hearing be had to determine the validity of the search warrant prior to the Petitioner being called as a witness. The request for an order shortening time was denied as was this Affiant's suggestion that the Grand Jury proceedings insofar as Mr. Gelbard was concerned should be stayed pending a determination of the validity of the search warrants and the right to recover the property seized.

Affiant is now involved or has been involved in three cases originating out o: the Central District of the United States District Court wherein the use of telephonic taps and search warrsnts for said taps have been secured. As far as Affiant can observe there are several common factors which run through these telephonic search warrant cases, at least insofar as their application is in the Central District. First of all, in the three cases of which Affiant has become acquainted (mentioning only principal defendants, this Petitioner; Vasquez; and Zerowitz) and they are as follows:

1. The telephonic tap search warrants are issued by the same judge (the Honorable A. Andrew Hauk).

2. As the telephone tap progresses, additional requests are made for extensions of time in which to tap, affidavits being filed which detail the material already discovered in the prior telephone taps. These extensions are granted.

3. All affidavits in support of the telephone taps and the material obtained from the taps are ordered sealed apparently for whatever period of time the Department of Justice or the United States Attorney's Office requests. Defense counsel are not permitted to have access to the material until the government is finished with it.

All affidavits in support of the search warrants are also ordered sealed and not made available for defense counsel so that it is utterly impossible to challenge the search warrants.

In two out of three of the cases (this Petitioner and the Zerowitz matter) additional ordinary search warrants have been issued as a result of the telephone taps and after the issuance of the ordinary search warrants and seizures of evidence made, Grand Jury investigations are scheduled wherein various persons from whom the material has been seized or who are in some way associated with the seized material are called in to testify before the Grand Jury before indictments are issued.

That this Affiant, as an attorney, in observing thelengths of the telephone taps permitted and the types of inquiries which exist within the Government, states that this Affiant is afraid to converse on the telephone with clients. Similarly, Affiant's clients are afraid to talk on their telephones for fear that they are tapped; that this fear of conversing over the telephone instigated by the Government through the use and misuse of telephone taps as purportedly authorized by the Congress of the United States puts a ' chill" on the exercise of free speech.

In the opinion of this Affiant, the United States Department of Justice and the United States Attorney's Office for the Central District of California have created a plan of action using an illegal and unconstitutional statute, to wit: 18 USC § 2518, together with the subpoena and investigative power of the Grand Jury, all of which are arms of the Courts of the United States, to utilize evidence unlawfully seized for the purpose of their own "investigations" and to thwart and prevent citizens whose property and words which have been seized from exercising their rights to access to the Courts for the purpose of having the legality of the searches and seizures challenged, all of which constitutes a denial of due process of law, deprivation of the right to counsel, an abridgement of free speech, all in violation of Amendments One, Four, Five, Six and Nine (invasion of privacy) to the United States Constitution.

Further, Affiant believes that acquiesence into these procedures by the Judges of the United States District Court in declining to grant access to the affidavits in support of the telephonic search warrants and ordering them sealed . . . and in refusing access to the Courts in a timely fashion so that appropriate rulings may be made as to the legality of the searches and seizures aids and abets the plan of the Government to utilize the unlawfully seized evidence at special hearings and is directly contrary to the express mandate of 18 USC § 2518 which provides that if affidavits in support of telephonic search warrants are not supplied to the

person whose telephone is tapped, a minimum of ten days before a "hearing" the evidence cannot be used at all.

The earliest possible date for hearing motions to suppress under the "17-day rule" of the Rules of Court is January 25, 1971, and a suppression motion has been noticed for that date at the hour of 9:30 AM in front of the Honorable David W. Williams.

WHEREFORE, Affiant respectfully prays that the temporary restraining order and the writ of mandates herein prayed for issue.

Affiant says nothing further.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NOTICE OF MOTION TO QUASH SEARCH WARRANT; FOR RETURN OF PROPERTY UNLAWFULLY SEIZED (Rule 41, Federal Rules of Criminal Procedure); and ORDER SHORTENING TIME

TO: THE CLERK OF THE ABOVE ENTITLED COURT AND THE UNITED STATES OF AMERICA, AND ITS ATTORNEYS:

PLEASE TAKE NOTICE that on January 11, 1971, at the hour of 2:00 PM in the courtroom of the Honorable David W. Williams, located in the Federal Court House, Temple and Spring Streets, Los Angeles, California, a motion will be made and is hereby made to quash search warrants numbered 311 and 330, copies of which are attached hereto as exhibits, and to return all property seized as a result of said search warrants.

These motions will be based upon the following grounds under the Fourth Amendment to the United States Constitution and Rule 41 of the Federal Rules of Criminal Procedure:

1. That the affidavits upon which the search warrants were premised (copies of which have been withheld from the moving party) were insufficient on their face to support the issuance of a search warrant.

2. The warrants on their face are general search warrants and void.

3. The articles seized allegedly pursuant to said search warrants were not properly seized and not particularized in the search warrants.

4. That the method of searching the house and the entry thereto was in violation of the United States Constitution and the laws of the United States of America.

5. That if the affidavits in support of these search warrants are valid on their face, that the evidence obtained to support the probable cause" stated in said affidavit or affidavit was obtained as a result of a tap of Mr. Gelbard's telephone, which said tap was unlawful search and seizure under the Fourth Amendment to the United States Constitution for all of the reasons above enumerated as to the reasons for the defective affidavits in support of these search warrants. (*Katz v. United States*, 389 U.S. 347 (1967); *Berger v. New York*, 388 U.S. 41 (1966).)

These motions will be based upon the affidavits in support of the search warrants, the evidence oral and documentary as shall be produced at the hearing of these motions, and such Points and Authorities as shall be supplied to the Court in support of these motions at the time of the hearing.

DATED: January 6, 1971.

AFFIDAVIT OF BURTON MARKS IN SUPPORT OF ORDER SHORTENING TIME

STATE OF CALIFORNIA)
: ss.
COUNTY OF LOS ANGELES)

BURTON MARKS, deposes and says:

I am an attorney at law duly authorized to practice law before all the Courts of this State and before this Honorable Court, and am a partner in the law firm of Marks, Sherman & London, a Professional Corporation, and one of the attorneys for David Gelbard, the moving party herein.

That on or about December 12, 1970, a search was made of the house of David Gelbard. Various items were recovered as set forth in the return to the search warrants, copies of said returns are attached hereto as exhibits.

Declarant is informed and believes and thereon alleges that the affidavits in support of the issuance of the search warrants were insufficient as a matter of law to establish probable cause for the issuance of the search warrants. Your declarant has been unable to see the said affidavits for reasons best known to the Government, not this declarant.

That an order shortening time to challenge the unlawful seizure of declarant's client's personal property is necessary because Mr. Gelbard has been subpoenaed to appear before the Grand Jury in this case on January 13, 1971 at 10:00 AM (a copy of said subpoena is attached hereto as an exhibit to this affidavit) and declarant is informed and believes and thereon alleges that the office of the United States Attorney intends to and will question Mr. Gelbard about items recovered from his home, which said items were unlawfully seized as aforesaid, and the Fourth Amendment to the United States Constitution prohibits the use of unlawfully seized evidence "for any purpose whatsoever" (*Fahy v. Connecticut*, 375 U.S. 85 (1963)).

Your declarant is further informed and believes and thereon alleges that much of the evidence obtained for the affidavit in support of the search warrants issued for the search of Mr. Gelbard's residence was obtained through the use or issuance of another "telephonic search warrant" or "telephone tap" and that such search warrants and the underlying affidavits were unconstitutional and void and not based on any probable cause which would be sufifcient to unlawfully issue such a telephonic tap or search warrant. That declarant has no access to said "tap search warrants nor to the underlying supporting affidavits.

WHEREFORE, your declarant respectfully prays that the order shortening time attached hereto issue from this Court so that a hearing may be had on the motions on the date set forth in the moving papers.

Dated: January 6, 1970.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXCERPT FROM PROCEEDINGS OF THURSDAY, MARCH 18, 1971 BEFORE: KOELSCH, CARTER and TRASK, Circuit Judges.

ORDER OF SUBMISSION

This cause coming on for hearing, Burton Marks, Esq. and Adrian Marshall, Esq. argued for the appellants and Alfred N. King, Esq. argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DAVID GELBARD,
Defendant-Appellant.
No. 71-1263

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SIDNEY PARNAS,
Defendant-Appellant.
No. 71-1264

[June 8, 1971]

Appeal from the United States District Court for the Central District of California

Before: KOELSCH, CARTER and TRASK, Circuit Judges

PER CURIAM:

These consolidated appeals involve persons who proved recalcitrant when they appeared as witnesses before a federal grand jury and who were each committed to custody pursuant to 28 U.S.C. § 1826(a), after being adjudged guilty of civil contempt. In order to meet the rigorous statutory time limit imposed by 28 U.S.C. § 1826(b) it was necessary to, and this court did, immediately following oral argument, render decision. We affirmed the judgment of the court below and stated an opinion would follow. This is that opinion.

Both Gelbard, the appellant in No. 71-1263, and Parnas, the appellant in No. 71-1264, refused to answer any questions based upon information gained by the government from wiretapping

authorized by the district court pursuant to 18 U.S.C. § 2518, which is a part of Title III of the Omnibus Criminal Control Act and Safe Streets Act of 1968, Pub. L. 90-351, June 19, 1968, 82 Stat. 218. When cited for contempt in the district court, each attacked the constitutional validity of Section 2518, and additionally urged that he should not be required to testify until and unless first allowed to inspect all applications, orders, tapes and transcripts relating to such electronic surveillance and afforded an opportunity to suppress the use before the grand jury of any evidence so secured. The court rejected their contentions and held the statute valid.

We find it unnecessary to consider the district court's finding that Section 2518 is constitutionally valid. A witness before a grand jury lacks standing to challenge a statute on constitutional grounds unless the statute directly bears upon his privilege against self-incrimination. *Carter v. United States*, 417 F.2d 384, 386-7 (9th Cir. 1969), *cert. denied*, 399 U.S. 935 (1970). Section 2518 is not in that category.

It appears to be settled that a witness in a grand jury proceeding has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used in such a proceeding. See *Cobbledick v. United States*, 309 U.S. 323 (1940); *Costello v. United States*, 350 U.S. 359 (1956) and *Lawn v. United States*, 355 U.S. 339 (1958). Finally, we agree with the Fifth Circuit's decision in *Dudley v. United States*, 427 F.2d 1140, 1141 (5th Cir. 1970) "that nothing in the Omnibus Act, particularly § 2518(10)(a) created a statutory exception which would permit a pre-indictment motion to suppress evidence that might be presented to the grand jury. . . . The legislative history of the Act supports this conclusion. See Senate Report No. 1097, 90th Cong. 2d Sess. (1968) at p. 2195."[1]

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[1]The report contains this statement:

"Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States, 384 U.S. 251 (1965)). There is no intent to change the general rule."

Neither does 18 U.S.C. § 2518(9) support appellants in their contention.

David Gelbard and Sidney Parnas

that as witnesses they were entitled to copies of the applications and orders for the interceptions, together with transcripts, tapes, etc.

The language of paragraph (9) does not so indicate and the Legislative Report shows that paragraph (9) must be read in pari material with paragraph (10). Thus, paragraph (9) is intended to enable a party charged with a criminal offense or facing other adversary proceeding to secure copies of the application for and the order permitting the interception to enable him to move to suppress evidence so gathered; but it does not extend to grand jury proceedings. As the Report states: " 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing." *Id.* p. 2195.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

No. 71-1263

DAVID GELBARD,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

No. 71-1264

SIDNEY PARNAS,
Defendant-Appellant.

Appeal from the United States District Court for the Central District of California
[June 8, 1971]

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 8, 1971

EXCERPT FROM PROCEEDINGS OF WEDNESDAY, JUNE 23, 1971 BEFORE: KOELSCH, CARTER AND TRASK, CIRCUIT JUDGES.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellants filed March 31, 1971 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied, suggestion for a reharing in banc is rejected.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO FURNISHING WITNESSES TRANSCRIPTS OF THEIR INTERCEPTED CONVERSATIONS PRIOR TO THE WITNESSES' APPEARANCE BEFORE THE GRAND JURY

[Filed February 12, 1971]

FACTS

The witnesses, Sidney Parnas and David Gelbard, have been called before the Grand Jury to testify as to their knowledge in two totally unconnected areas. (For the Court's information, the Government is unaware of any connection whatsoever between Parnas and Gelbard.) In the case of both witnesses, a premises under his control has been searched pursuant to a warrant issued by a United States Commissioner. Recited in the affidavit submitted to the Commissioner to establish probable cause in both instances were excerpts of intercepted conversations to which Parnas or Gelbard, as the case may be, were parties.

Neither Mr. Parnas nor Mr. Gelbard have been arrested in connection with these matters, or in connection with any other matter to the Government's knowledge. Neither Mr. Parnas nor Mr. Gelbard are being contemplated as defendants by an sovereignty to the Government's knowledge. Both individuals have been summoned to testify concerning their knowledge of individuals who are defendants in this Court: Mr. Parnas as to Mr. Jerome Zarowitz and others; Mr. Gelbard as to Mr. Gerald Hay Kilgore and others. The matters as to which their testimony is sought are not related to the criminal cases pending against Messrs. Zarowitz and Kilgore.

Mr. Parnas had conversations intercepted pursuant to a telephonic interception under 18 U. S. C. § 2518 authorized by Judge A. Andrew Hauk as to the telephones of Mr. Zarowitz. Mr. Gelbard was intercepted pursuant to a similar order as to the telephones of Mr. Kilgore.

The Government seeks to obtain the testimony of these witnesses and does not deny that, in the course of said testimony, the transcripts of the pertinent conversations may be used to refresh the witnesses' recollection as to the events at issue.

Both witnesses now move that transcripts of all their intercepted conversations be supplied them ten days before their testimony, claiming they are entitled to this disclosure under Section 2518(9) of Title 18, United States Code. In addition, witness Parnas claims he is entitled to the transcripts under Section 2518(10) of Title 18.

The Government opposes both motions on the grounds that the witnesses are not entitled to said transcripts under either cited section.

ARGUMENT

The Witnesses' Claims as to Section 2518(9)

Section 2518(9) provides, in pertinent part:

> The contents of any intercepted wire or oral communication shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal . . . court unless each *party*, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the *court order*, and *accompanying application*, under which the interception was authorized or approved.
>
> * * * * *

[Emphasis supplied.]

It should be noted at the outset that no provision is made in the Section for discovery of the transcripts of intercepted conversations; only the order authorizing interception and the application for that order. (Furthermore, the applications and orders in these cases were sealed under 18 U.S.C. 2518(8)(b), and, to date, no effective effort has been made to move for their discovery by either witness.)

No provision whatever is made for the discovery of *transcripts* in subsection 9. Thus, the Government contends initially that the very terms of Subsection 9 preclude the witnesses' reception of transcripts in connection with their appearance before a Grand Jury.

This conclusion is reinforced by the wording of the subsection itself, since only a "party" to the trial, hearing, or other proceeding is entitled to even so much as the orders and applications prior to use in evidence of the tapes and transcripts. No person is a party to a grand jury proceeding, since it is not an adversary proceeding. *United States v. Levinson*, 405 F.2d 971, 980 (7th Cir. 1968). It is, by nature, an *ex parte* proceeding. *See, e.g., Costello v. United States*, 350 U.S. 359, 362, 364 (1956); *Coppedge v. United States*, 311 F.2d 128, 132 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 946 (1963).

Should there be some doubt as to who is entitled to the orders and applications, and whether or not such orders and applications need be furnished *a witness* 10 days in advance of his testimony if he is to be examined on the contents of his telephone calls, such doubt is dispelled by the legislative history of Subsection 8. The Senate Committee stated, as to the 10 day requirement:

> "Proceeding" is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing. S. Rep. No. 1097, 90th Cong. 2d Sess. P. 105 (Apr. 29, 1968).
>
> [2 U. S. Code Cong. & Admin. News 2195 (1968)].

Thus, it is clear that a Grand Jury witness is not even entitled to the orders and applications supporting the interceptions, much less the tapes and transcripts of the intercepted conversations. *The Witness Parnas' Contentions as to Section 2518(10)*

Subsection 10 provides that a person aggrieved by a tap may make a motion to suppress the intercepted conversations. In connection therewith the Court, "in the interest of justice," may "in his discretion" make available to the aggrieved or his counsel portions of the intercepted communications.

Granting the terms of the Subsection, the fact is that the witness Parnas does not fall within them. No such motion to suppress has been filed, nor—to the Government's knowledge—is one contempalted. For a prerequisite to such a motion is discovery of the terms of the order and the contents of the application under 18 U.S.C. 2518(b) so that an intelligent and knowledgeable motion can be presented the Court. The witness Parnas has not even made a motion under 2518(8)(b) as yet.

Nor can he expect that Grand Jury proceedings be suspended until he does so. Since he is not now a defendant before this Court, his motion to suppress would have to be

of a civil nature and require at least 60 days before decision. Even putting aside this practical consideration, the motion to suppress in Subsection 10 was not intended by the Congress to be available to a Grand Jury witness to stay his appearance and testimony.

> Because no person is a party as such to a grand jury proceeding, the provision *does not* envision the mailing of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. . . . There is no intent to change this general rule. Id. at 106. [Emphasis supplied]
>
> *See also, Blue v. United States,* 384 U.S. 251, 255 n.3 (1965).

Therefore, the Government submits that the witnesses have no right to discovery of the tapes or transcripts of their intercepted conversations before their appearance before the Grand Jury under the cited Subsections of 18 U. S. C. 2518.

Equitable Consideration

Although not articulated as such, the witnesses have hinted that the Court should, in the interest of justice, allow the witnesses to see the transcripts of their intercepted conversations prior to their appearance before the Grand Jury.

Quite obviously, if the Government is going to use the transcripts to refresh the witnesses' recollection as to the matters of inquiry, said transcripts will be either shown or read to them at the appropriate time at any rate. No good reason would appear why the witnesses should have 10 days to review the transcripts.

Cases in which grand jury witnesses have asked to see the Government's evidence prior to testifying are rare indeed, possibly because few witnesses have the temerity to raise the point. Counsel's research has revealed, however, that the point was raised in *United States v. Winter,* 384 F.2d

204 (2nd Cir), *cert. denied.* 382 U. S. 905 (1965). In that instance the witness, Winter, claimed that he should have been apprised by the prosecutor of the other witnesses' testimony concerning his action, before he was called to testify before the grand jury. The Second Circuit soundly rejected this contention.

> [T]here is no duty upon the prosecution to inform a witness, even a potential defendant, of the testimony of other witnesses before the grand jury—indeed it would appear that the Federal rules prohibit such disclosure. [Fed. R. Crim. P. 6(e). See *Hale v. Henkel,* 201 U. S. 43 (1906)] *An oath to tell the truth as one knows it is not conditional upon what others may have testified.* Id. at 210. (Emphasis supplied]

CONCLUSION

For the reasons cited the Government respectfully requests that the motion of the Witness Parnas be denied and that the Witness Gelbard be directed to take the oath and testify.

Respectfully submitted,

ROBERT L. MEYER
United States Attorney

MEMORANDUM OF LAW RE RIGHTS OF WITNESS SIDNEY PARNAS UNDER THE SO-CALLED "WIRETAP STATUTE," TITLE 18 SECTIONS 2510 ET SEQ. U.S.C.

[Filed February 16, 1971]

I

INTRODUCTION

The heart of this motion is simple—the witness, Sidney Parnas, an "aggrieved person" under Section 2510 (11) of Title 18 U.S.C., seeks due process under Sections 2518 (9) and (10). Because of the extreme shortage of time in which

to prepare this brief, movant refers the Court to the Xerox copies of the pertinent provisions of the wiretap statute, attached hereto as Exhibit A.

Under the law, the witness requests:

1. A copy of the Court Order, accompanying application and all portions of any wiretap material pertinent to defendant at least ten days before the contents of any wire or oral communication or derivative evidence shall be used or disclosed before the Grand Jury;

2. An opportunity to make appropriate motions under sub-section (10) (a).

In the discussion which follows, citations for propositions of law which counsel deems fundamental have been omitted but may be supplied at the time of the oral hearing onsFebruary 17, 1971.

II

FACTUAL BACKGROUND

The undersigned, counsel for movant, first met movant on February 9, 1971. This was one day prior to his scheduled Grand Jury appearance. At 2:30 P.M., on February 9, 1971, the undersigned commenced an interview with the witness Sidney Parnas during the course of which it was discovered that a search of the witness Parnas and the premises where he is employed was undertaken pursuant to a warrant based on an affidavit for same filed on or about December 10, 1970. Counsel reviewed the affidavit and discovered references therein to certain telephone conversations intercepted by the Government in which Sidney Parnas (while in New York City, where he works and resides) was apparently a party. The wiretap was apparently directed at another person and was carried on pursuant to an Order issued by a United States District Judge. Upon discovering same, counsel immediately read the so-called wiretap statute and proceeded to call Government counsel, Alfred N. King. Mr. King was asked if he intended to use the con-

tents of any intercepted wire or oral communication or evidence derived therefrom at the Grand Jury proceeding before which Mr. Parnas was summoned to testify and movant's counsel determined from the conversation that followed that Mr. King did intend to use such contents.

The following day, February 10, 1971, in the presence of the Grand Jury, the witness Parnas moved for additional time pursuant to sub-section (10) (a) of Section 2518 of Title 18 to make appropriate motions and also asked for the ten-day statutory notice under sub-section (9) and materials referred to in said sub-section.

III

DISCUSSION OF THE ISSUES

It has been pointed out to movant's counsel that the legislative history appertaining to the wiretap statute makes it clear that, although Mr. Parnas is an "aggrieved person" under sub-section (11) of Section 2510 of Title 18, sub-sections (9) and (10) of Section 2518 do not contemplate the furnishing of said information and opportunity to object before a Grand Jury. Attached hereto as Exhibit B are pages 2194, 2195 and 2196 of Volume 2 of the 1968 edition of the U.S. Code Congressional and Administrative News.

In initial response, it should be pointed out that it is Hornbook law that the Court need go no further than the terms of a statute if its provisions are clear. Sub-section (9) of Section 2518 states unequivocally that the contents of any intercepted oral communication or derivative evidence shall not be received in evidence or otherwise disclosed in *any* proceeding in a Federal or State Court without furnishing the party with a copy of the Court Order, accompanying application and such portions of the intercepted communication or derivative evidence as the Judge determines to be in the interests of justice. Note Section 10 (a) (iii).

With such a clear expression on the face of the statute there is no need to refer to the legislative history. Obviously, if it had been intended that sub-sections (9) and (10) of Section 2518 *exclude* Grand Jury proceedings, it would have been a simple matter for the law to so provide.

But it didn't—and there must be reasons therefor. Courts *fundamentally* afford ample protection of Constitutional rights even when a statute does not. That is to say, every statute must be read in light of the constitutional guarantee of due process and all that the term implies. It is not necessary, however, for a Court to reach for a constitutional construction of the wiretap statute—the statute itself has a fundamental concept of due process built into it in sub-sections (9) and (10).

In the case of *Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed. 2d 287 (1970)*, quoting from an earlier decision, the Court stated:

> "'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean 234 US 385, 394, 58 L Ed 1363, 1369, 34 S Ct 779 (1914). The hearing must be at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62, 66, 85 S Ct 1187 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.'

Sub-sections (9) and (10) of Section 2518 merely codify this basic constitutional concept.

Why is the concept of notice and opportunity to be heard important in the present setting? Fundamentally, because we are dealing with the right to privacy, and not a tangible property right per se. The right to privacy is different from other property rights in several distinct particulars. In the ordinary sense, tangible property rights taken from a man

can be restored, and damages can, in theory at least, restore the status quo.

This is not true with the right to privacy. A bell once rung cannot be unrung. The witness Parnas does not appear to be the object of the massive electronic surveillance in this case; he apparently just had the misfortune to be talking with someone who was. But although *he* was not the object of the Government surveillance, it was *his* privacy that was invaded. That is to say, with no advance notice to him and no opportunity to prevent it, his conversations were overheard by Government agents.

Now, in the present setting, the Government attorney seeks to violate this privacy further by disclosing it to some twenty-three members of the Grand Jury without even giving Mr. Parnas notice that he was overheard and an opportunity to suppress this invasion of his privacy on any appropriate ground.

That is all the witness Parnas seeks of the Court: the notice provided for by the statute is sub-section (9) and a fair and reasonable opportunity to be heard under subsection (10). If the witness' objections are valid the Government *should* be prevented from abusing his privacy further. If his objections are overruled, the Government loses nothing.

What of the broad statement in the legislative history that furnishing a copy of the Court Order and accompanying application does "not include a Grand Jury hearing"? The Court will note that the legislative history makes reference to *Blue v. United States, 384 US 251 (1966)*. The pertinent language of the *Blue* case is set forth on Exhibit C. This case dealt with the extreme step of *barring* a Federal prosecution altogather. This, of course, is not the present case. The witness Parnas does not seek to bar anything. He merely wants his fundamental due process, notice and opportunity to be heard. Apparently implied in the interpretation of the *Blue* case by the draftsman of the legislative history is the implication that any evidence can be pre-

sented to a Grand Jury. The Court's attention is directed to this statement appearing on page 2195 of the legislative history ("Normally, there is no limitation on the character of evidence that may be presented to a Grand Jury, which is enforceable by an individual").

This is a gross misinterpretation of the law. The *Blue* case, in a footnote reference to the case of *Costello v. United States,* with citations set forth on Exhibit C, discussed the "abatement" of a prosecution before a Grand Jury based upon the presentation of tainted evidence. But the *Costello* case, which is now on very shakey grounds as a result of recent decisions of the Second Circuit Court of Appeals, simply held that hearsay evidence may be the basis of a valid Grand Jury indictment. The Court's attention is directed, however, to page 407 of *100 L.Ed.* at page 407 regarding the quashing of a Grand Jury indictment based upon a violation of the constitutional rights of the accused. We are not here dealing with a simple question of hearsay evidence before the Grand Jury. We are concerned with deeper constitutional issues. We need not rely on inferences of what the Court did not rely upon in the *Costello* case, h however, since the matter will be discussed hereinafter.

These points are self-evident:

1. The Federal Grand Jury is the arm of the Court and subject to its supervisory control. *74 Harvard Law Review 590.*

2. The Federal Court has power to prevent a prosecutor from performing in any manner which may violate a witness' constitutional rights before a Grand Jury. *Sheridan v. Garrison, 273 F.S. 673.(E.D.La.67); Chandler v. Garrison, 286 F.S.191 (E.D.La 68).*

3. Federal Courts have extensive ancillary powers to effect their jurisdiction. *Morrow v. District of Columbia, 417 F.2d 728 (D.C.Cir.1969).*

Now, if the constitutional rights of the witness Sidney Parnas *have* been violated, is it the Government's position

that he is utterly powerless to do anything about it? Must be sit idly by while his private conversations are used further before a Grand Jury? If he has no rights to prevent "disclosure" of his private communications before a Grand Jury, is it the Government's position that he must await trial before a judicial redress of these violations? If so, what happens if he is never indicted and there never is a criminal proceeding brought against him?

If his right to privacy has *any* meaning in our country, at the very least he should be able to hear what the Government has heard when it has heard it without any showing of probable cause and without any prior notice to him. These requirements, set forth in sub-sections (9) and (10) of Section 2518, are the minimum requirements before the Government can further abuse his privacy.

Mr. Parnas can hardly determine the nature and extent of the violations of his constitutional rights until he sees the application for the wiretap order, the Order and the wiretap material itself pertaining to him. He makes no motions at this time other than a request for fundamental due process - reasonable notice and an opportunity to be heard.

It is submitted that the Government attorney himself may not know what constitutional infractions have taken place pertaining to Mr. Parnas; further, the Government attorney should not be permitted to make an ex parte determination of that issue.

A full and complete disclosure of the extent to which the witness has been overheard should be made and then, in an adversary hearing, the witness' objections should be heard by the Court. In this regard, the Court's attention is directed to excerpts from the case of *Alderman v. U.S., 394 U.S.165, 22 L.Ed, at pages 192 and 193*, attached hereto as Exhibit D.

The Court's attention is directed to one final point. Despite the gross mis-statement of the law in the legislative history of the wiretap statute relating to the lack of limitation

of the character of evidence that may be presented to a Grand Jury, in *Go-Bart Importing Co. v. U.S., 282 U.S. 344 at 355*, the Supreme Court held that a Federal District Court has jurisdiction prior to an indictment on an Order to Show Cause where the petitioners raised questions under the Fourth and Fifth Amendments. For the Court's consideration, attached hereto as Exhibit E are pages 620 and 621 of 7 L.Ed.2d - from the opinion of *Di Bella v. United States, 369 U.S. 121*, dealing with the subject of pre-indictment motions to suppress.

Unlike the defendant in the *Blue* case or the defendant in the *Costello* case, the witness Sidney Parnas does not seek to bar the Grand Jury from proceeding further nor to quash an indictment based upon merely incompetent evidence—he seeks fundamental due process, notice and opportunity to be heard.

For all of the foregoing reasons, movant requests all of the rights afforded him in sub-sections (9) and (10) of Section 2518 of Title 18 of the United States Code.

Dated: February 16, 1971.

CRIMINAL MINUTES – GENERAL

Case No. 2658 Date Feb 10, 1971

DOCKET ENTRY: Hrg; ent procs, Ct & cnsl confer. Mot by govt to compel testimony of witness Parnas. Witness moves Ct for cont of hrg. Ct grants mot & ords Hrg cont to 2/17/71 at 9am. All pts & auths to be fld by 2/16/71 at noon, by wit. Govt to file pts & auths by 2/12/71 at 12 noon. (EAC)

PROCEEDINGS: Government makes motion to the Court to compel the witness to answer questions before the Grand Jury. Court and counsel confer. Witness makes motion for continuance of hearing.

Court grants motion and orders bearing continued to 2/17/71 at 9am. Government to file all briefs by 2/12/71. Witness to have all briefs filed by noon on 2/16/71.

CRIMINAL MINUTES – GENERAL

Case No. 2658-Misc Crim Date Feb 17, 1971

DOCKET ENTRY: Cnsl argue met to Ct. Ct rules that matters are not to be litigated before the G/J and are not appropriate before this Ct at this time. Ct fur rules that Rights of parties are sufficiently protected & appears that statute is Constitutional. Wit is ord by Ct to appear before the G/J & ans Questions propounded or he will be held in contempt of Ct. Wit advised that he still has the right to express 5th amndmnt privilege.

PROCEEDINGS: In the Matter of Grand Jury Testimony of Sidney Parnas

Hearing: Motion by Witness for Government to furnish transcripts of his intercepted conversations prior to the Witnesses' Appearance before the Grand Jury.

Court and counsel confer re motion. Counsel argue motion to the Court.

Court rules that these matters are not to be litigated before the Grand Jury and are not appropriate before this Court at this time. Court further states that the rights of the parties are sufficiently protected and it appears that statute is constitutional. Court orders witness to appear before the Grand Jury and answer questions propounded or witness will be in civil contempt of this Court. Witness is advised by Court that he has the right to express the 5th amendment privilege.

CRIMINAL MINUTES – GENERAL

Case No. 2658-MISC CRIM Date Feb 17, 1971

DOCKET ENTRY: In the Matter of Sidney Parnas, Witness before the Grand Jury

Hrg: Govt cnsl state wit has refused to testify before G/J. Ct reporter Nancy Long C.S.T. & reads Qs propounded to witness. Ct ords wit to ans Qs. Wit refuses to ans. Ct finds wit in contempt of Ct & ord wit committed to Custody of A/G unitl Qs ans or as long as the life of the G/J, which ever is shorter. Mot by cnsl for stay of exec of commitment until 12 noon on Feb 23, 1971. Witness to surr to U.S. Marshall on that date-Ct grants mot & ords wit to surrender on that date and time or bench warrant will issue for his arrest. (EAC)

PROCEEDINGS: Hearing: Court and counsel confer. Government informs Court that witness Parnas has refused to answer questions before the Grand Jury. Court Reporter Nancy K. Long is called and sworn. Court reporter reads questions propounded to the witness before the grand jury, and the responses given by the witness. Court questions witness and witness refuses to answer questions.

Court finds the witness in contempt of court for failure to testify before the Grand Jury and Orders witness committed to the Custody of the Attorney General until questions are answered or as long as the life of the Grand Jury.

Motion by counsel for witness for stay of execution until noon on 2/23/71—is granted by the Court. Court orders witness to surrender to U.S. Marshall on that date and time or bench warrant will issue for his arrest.

NOTICE OF APPEAL
[Filed February 18, 1971]

Notice is hereby given that Sidney Parnas, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of District Judge E. Avery Crary entered in this action on February 17, 1971, holding the defendant in civil contempt of the court and committed into custody of the United States Attorney General until he purge himself of the contempt by appearing before the Thompson Federal Grand Jury in Los Angeles, California.

Dated: February 18, 1971.

[4] LOS ANGELES, CALIFORNIA, WEDNESDAY, FEBRUARY 17, 1971, 9:00 A.M.

THE CLERK: No. 1 on the calendar, 2636-Miscellaneous Criminal, In the Matter of Grand Jury Testimony of David Gelbard.

Case No. 2, 2658-Miscellaneous Criminal, In the Matter of Grand Jury Testimony of Sidney Parnas.

Counsel, will you please announce your appearances.

MR. MARKS: Good morning, your Honor. Burton Marks for Mr. Gelbard, who is present in court.

MR. MARSHALL: Adrian Marshall, your Honor, for Sidney Parnas.

MR. KING: Alfred N. King for the Government in the matter of Parnas, your Honor.

MR. THALLER: Robert S. Thaller for the Government in the matter of Gelbard, your Honor.

THE COURT: Very well. I have points and authorities of Mr. Marks and Mr. Marshall that I have examined.

Does anyone know what the result of the Blott case is? What disposition has been made of the Blott case down in Florida? That is the one you cited, Mr. Marks.

MR. MARKS: That is still pending before the [5] Fifth Circuit, your Honor. As far as I know there has been no—

THE COURT: What was the decision in the trial court?

MR. MARKS: In the trial court the contentions of the attorneys for Mr. Blott were held against him.

THE COURT: Were held what?

MR. MARKS: Against Mr. Blott.

THE COURT: The statute was held to be constitutional?

MR. MARKS: I would say that that is a fair statement.

THE COURT: I mean, I gather that from—

MR. MARKS: Yes.

THE COURT: —what you say, that it was held against him.

Does counsel for the Government know anything about that case?

MR. KING: Not under the name Blott, your Honor.

THE COURT: Did you read Mr. Marks' authorities?

MR. KING: For that matter, I never saw Mr. Marks' brief.

THE COURT: Oh. United States v. Phillip Blott, Southern District of Florida.

[6] MR. KING: Your Honor, there is a case in Florida that upheld the constitutionality of the statute. To my knowledge it was not—the one I know about is not the one he is citing, though. I think it is Filatoni.

MR. MARKS: It may be that Mr. Blott was representing the people from who I got the points and authorities.

THE COURT: Oh, I see. It may be the same case. Do you know the number of the case, the case you are talking about?

MR. KING: No, your Honor, I do not. I have a copy upstairs and I could probably get it.

MR. MARKS: I'm sure it is the same case because I was discussing the matter with attorneys in Florida and they tell me this is the first case that came out of Florida that is up to the appellate court.

MR. KING: It is probably the same case, your Honor.

THE COURT: Well, that was an adversary proceeding in which the constitutionality was squarely placed before the court, isn't that right?

MR. MARSHALL: Your Honor, I have what may besyou are looking for, the Escodar case.

MR. KING: That is the one I was trying to think of.

[7] THE COURT: Is it 143, 70-143?

MR. MARSHALL: No, it is 70-333.

THE COURT: What is that, is that the opinion of the court?

MR. MARSHALL: It is the opinion of the District Court in Florida regarding the overall questions, constitutionality of the questions.

THE COURT: It was raised at trial, wasn't it?

MR. MARSHALL: Yes, your Honor.

THE COURT: It was not a grand jury proceeding.

MR. MARSHALL: I believe it was a motion to suppress shortly prior to the trial.

THE COURT: In other words, there had been an indictment.

MR. MARSHALL: Yes.

THE COURT: It was not a grand jury proceeding matter.

All right. Go ahead. I will hear from the Government. You are going to talk about Parnas?

MR. KING: Yes, your Honor, and as far as it applies to Mr. Gelbard, also.

THE COURT: All right.

MR. KING: May it please the court, generally I think we can state—

THE COURT: You have read Mr. Marks' points [8] and authorities?

MR. KING: Yes, your Honor, I have.

THE COURT: All right.

MR. KING: Generally I think we can state with agreement that unless there is broad overreaching by the Government in the grand jury proceeding that the court will not invoke its supervisory power to decide at the time of the grand jury hearing what evidence is or is not admissable at trial.

As your Honor well knows, a grand jury in its precedents could indict by the private knowledge of its individual members, and such evidence, of course, could never be introduced at trial. So I think we may start out on that presumption, that unless there is a broad overreaching by the attorneys for the Government—

THE COURT: How do you determine if there is a broad overreaching?

MR. KING: Your Honor, I think you would have to go to basic concepts of fundamental fairness. If they are doing something that is totally unfair, then I think the courts will, in every instance, come forward and stop the Government from doing violence to the concept of due process. I think that is what we have to look to, the basic concepts of due process.

Also, I think we have to look a little bit [9] further than that, too, to the ability of the grand jury to do its work unencumbered by unnecessary motions brought by various witnesses that may be brought before it.

Now, there is no question but that the witnesses in these matters have several rights which are available to them.

I don't think there is a bit of question but that they have the right to obtain the application and orders which were filed before this court and led to the interception of their conversations. I don.t think there is a bit of question but they have a right to make a motion to suppress.

THE COURT: You are talking about in a grand jury proceeding now?

MR. KING: Not in a grand jury proceeding.

THE COURT: All right. Make yourself clear. We are talking now about a grand jury proceeding.

MR. KING: Yes, your Honor.

THE COURT: All right.

MR. KING: In the long run should they wish to make a civil motion to suppress in this court, I think they have a right to do it.

If they are called before the grand jury and if they think it is necessary they have a right to claim their privilege of silence under the Fifth Amendment. And if [10] you analyze it from top to bottom they may be harmed in no way except as a defendant before this court. And if they appear as a defendant before this court and the motion to suppress which they brought civilly or could bring as an adjunct in the criminal prosecution would fully protect their rights.

On the other hand, if we allow a motion to suppress to be brought in regard to a grand jury proceeding there are several detriments that do fall upon the grand jury. First of all,—on the courts, I might add, also, because we will have a proliferation of motions to suppress by various witnesses, each of which must be decided by some adjunct of this court, by some judge of this court independent of the motions to suppress which quite obviously will be brought

by Zarowitz and Kilgore in this matter. It will hold up the grand jury investigation and prevent it from reaching the testimony of these witnesses until such matters are finally cleared up.

I would like to remind the court the grand juries generally have an 18-month duration. If they are to be met with this type of obstructionism by every witness there is going to be precious little grand jury investigation done in this District.

The witnesses in their briefs—or I should say the witness Parnas' brief, at least, asks the question, [11] "Well, what happens if the defendant is never indicted?" Well, the simple answer to it is at that point there is no detriment to him.

What the Government is seeking purely and simply is the testimony of the witness Parnas. Now, with regard thereto I do not think that he has the right to obtain the transcripts and tapes of the intercepts. Should he make a motion for them I think he would be entitled to the orders and applications. But until we receive the brief—

THE COURT: When? Are you talking about so far as the grand jury is concerned?

MR. KING: No, sir.

THE COURT: Well, I know, but you are not making yourself clear. You are saying if he files a motion he is entitled to the application—period.

MR. KING: Not in connection with the grand jury proceedings.

THE COURT: Well, you had better make it specific. We are talking about a grand jury proceeding now.

MR. KING: If he comes in a separate action and files for those orders and applications, totally independent of his appearance before the grand jury—

THE COURT: I am not determining that.

MR. KING: I think you are, your Honor.

[12] THE COURT: All I am determining is he entitled to this in a grand jury proceeding. You don't have to argue what he is entitled to outside of a grand jury proceeding,

except your point is well taken that he does have the right to move to suppress if there is an adversary proceeding that results.

MR. KING: Yes, your Honor, and he has a right independent of the grand jury proceedings to start that adversary proceeding himself. But that has nothing whatever to do with the grand jury proceeding.

THE COURT: All right.

MR. KING: I have pointed out in my memorandum that ordinarily the Congress and certainly the law up to now has not recognized the general rights of a witness to, ancillary to his appearance before the grand jury, make a motion to suppress or to contest generally the evidence presented before the grand jury.

I would only say that only what is a great over-reaching by Government counsel that the court has a right to step in in a supervisory capacity over the grand jury, since the grand jury is an arm of the court, and say to Government counsel, "You will not do this," or "You will do that." I do not think we have reached that point in this particular matter.

As I pointed out in my memorandum, these [13] conversations will be used to refresh the witness' recollection. They can only be used for that point, if they are read or shown to the witness. He is going to see them should it become necessary. But he does not have to see them ten days in advance.

Should it become necessary, after they are read to him, he is free to withdraw from the grand jury room and consult with his counsel if he thinks that is necessary, and to decide with his counsel what answers he will make or whether he will make any answer at all. His rights in that regard are fully protected.

If, on the other hand, he is to be allowed ten days to examine transcripts and tapes—I don't put this at the door of present counsel or at the door of the present witnesses—but I would like to call to the court's attention the possibility that in the future some unscrupulous practitioner

might have ten days to sit back and figure out a story which the witness should tell to fit the facts he then knows the Government knows. That, I think, is not the way to seek truth in the court—in this court and should be avoided.

Now, basically those are the main considerations that I wish to bring to the court's attention. If the court has any questions I will be glad to try and answer them.

[14] THE COURT: I will hear from Mr. Marks or Mr. Marshall.

MR. MARSHALL: Your Honor, I have tried to confine my memorandum to the narrow issue before the court, whether or not the grand jury sitting might find my client, Mr. Parnas, is entitled to merely what the law provides.

I think it goes without saying he is an aggrieved party. I have never heard any claim to the contrary. I think Subsections 9 and 10 of Section 2518 must necessarily be read together. The statute is clear on its face. It provides that in any proceeding a witness is entitled to notice, and I presume that means with the thought that he will have an opportunity to be heard in filing any appropriate motions.

I raise the point in my memorandum that there is no question but that the court has definite power to control any proceeding before the grand jury.

I cited the Go-Bart case for the proposition that before any indictments are handed down a court may inquire into any propriety before the grand jury for the submission of any type of testimony or evidence.

I have submitted excerpts from the DiBella case to show these matters had been before the Supreme Court and at least tacit recognition had been given to the fact that there are pre-indictment motions. I don't think there [15] is any question about the court's authority. From that point on it is simply a question of due process.

I claim that until my client knows what was heard he can't have due process. He must have an adequate opportunity to study the application and the orders to test probable cause as it relates to him.

Wiretap orders in their present usage are directed primarily at one party. Perhaps probable cause may be established as to that party. But during the course of the mass of electronic surveillance by the Government perhaps dozens, maybe even hundreds of persons are over-heard and then subpoenaed before the court. If they are brought in and on short notice not even told that the Government had invaded their privacy, and they are ordered to answer questions regarding the contents of the overheard conversations, I think there is a fundamental denial of due process. I only ask, not to barter the grand jury proceedings, not to thwart it, but simply for an opportunity to be heard and study the probable cause as it relates to my client and see the contents of the transcripts, to permit him time, if necessary, to make any appropriate motions.

I don't think that basically you can unring a bell. If you walk in there, and if the Government is permitted to do this, then it is too late. There will be no matter before the court to be heard, and if my client's [16] privacy has been violated, even—

THE COURT: Can't your client confer with you after he is asked the question, "Didn't you on so-and-so say so-and-so," or "Wasn't there a conversation between you and so-and-so?"

MR. MARSHALL: Well, the problem with that, your Honor, is in the ordinary context of the search there is an inventory and there is property taken. Counsel has sufficient time to study the files and make necessary motions.

In this situation I wouldn't know what to do. I don't know about the validity of the transcripts, for that matter. Wire recordings are picked up and they are played back and typists make transcripts. I have had no time at all to check into that, but the most important part is I have no opportunity to object to the Government's invasion of the privacy of my client, simply no time at all at that point.

I wouldn't mind at that point, if on the first questioning he could walk out in the hall, and I would say, "Well, go no further until we have had it before a judge." But I think that is an inexpedient method of doing business.

So far as thwarting the progress of the grand jury, I believe I have covered that, your Honor. They can go on with their business as usual. If they would [17] afford a ten-day notice to witnesses perhaps in many cases the witness would not wish to test it further. But it is no excuse to step on a man's constitutional rights to say that the grand jury has to do business.

Basically, your Honor, I simply want time to study the application, the order and the contents before my client goes further. I think it is so important that if it is not the result at this point it is going to come up again, and I would even suggest that my client test the matter, respectfully. If you have any questions, your Honor—

THE COURT: No, I don't have any questions.

All right. I will hear the Government now on the other matter, the Gelbard matter.

MR. KING: I don't think the Government has anything to add at this time to the matter of the witness Gelbard. We view the issues as apparently the same.

THE COURT: Mr. Marks?

MR. MARKS: I will try and be brief, your Honor. I do not believe that the issues with Mr. Gelbard are the same.

Now, I think for the sake of the record here, we received an order to show cause re contempt, and the Government has offered no evidence nor has stated—or any authorities whatsoever that Mr. Gelbard was in contempt [18] of the grand jury or of this court, there having been no order of the court which he could have violated.

It is conceded that Mr. Gelbard did appear at the grand jury and merely refused to be sworn in, and was not ordered by a court to do so.

As I stated in my moving papers, I would be willing to stipulate such a thing had been done. But at the present status of the record Mr. Gelbard is here an order of the court to show cause why he should not be held in contempt, and I think that is a preliminary matter which should be disposed of.

MR. THALLER: Your Honor, the Government does concede that, in fact, Mr. Gelbard has not been ordered before the court and an order to show cause would be improper at this time.

But on the Government's pleadings in this I wonder if it would be appropriate at this time that the court order Mr. Gelbard to return and testify before the grand jury.

THE COURT: My understanding is that he appeared before the grand jury and refused—you said he refused to be sworn.

MR. THALLER: And to answer questions.

THE COURT: And to answer questions. Were questions put to him or he just said he would not answer them?

[19] MR. THALLER: Your Honor, I have the court stenographer here. My memory is vague on—

THE COURT: Were you present?

MR. THALLER: Yes, I was, your Honor.

MR. MARKS: Maybe I can refresh counsel's recollection. As I recall, Mr. Gelbard, pursuant to my instructions, would not be sworn and stated that because he did not have an opportunity to examine transcripts.

THE COURT: He would not answer—

MR. MARKS: He was then called back and asked, "Would you answer questions if it wasn't under oath?"

THE COURT: Yes.

MR. MARKS: And he said, "Not until I see the transcript," and then he was excused.

MR. THALLER: That is correct, your Honor.

THE COURT: All right. Then the status is this is not an order to show cause re contempt because he hasn't been ordered to—

MR. MARKS: Do anything.

THE COURT: —answer questions.

MR. MARKS: That is correct. Or be sworn.

THE COURT: Or be sworn.

MR. MARKS: Now, the first question before the court, your Honor, perhaps— and I don't know if the court wants to hear that—is a very simple question of whether or [20]

not there is any law of the United States which requires that a witness take the oath either by way of swearing to God or an affirmation.

I have carefully or as best I could researched the law and I find no authority that says a witness must be sworn. As a matter of fact, that particular provision is absent from the grand jury Rule 6. It doesn't talk about a witness testifying under oath or testifying.

One of the Rules of Criminal Procedure talks about that evidence shall be that which is testimony of the witnesses, plus whatever evidentiary material is introduced.

However, again the word "testimony" is not defined in any rule of court that I can find nor in any rule of law as meaning under oath.

As a matter of fact, my—it is hearsay only—as I understand it in some of the states they have what is known as unsworn statements, unsworn testimony. A defendant may get up—as a matter of fact, it caused some celebration a few years ago on one of these civil rights acts where the defendant got up and made an unsworn statement. I think it was under Georgia or Mississippi law, where he stated what his case was and he couldn't be cross-examined, and the jury was advised that this was testimony not under oath, and what the proposition was, that it didn't have the [21] force and effect if not under oath.

So the probability or the existence of unsworn testimony does exist, and I do not think under those circumstances that the witness could ever be ordered to be sworn or take an oath.

Getting aside from that particular proposition, the real question is does Mr. Gelbard have a right to refuse to appear before the grand jury, perhaps refuse to appear at all, because of the likelihood that his constitutional rights have been violated and the likelihood that the grand jury is going to use—and the Government is going to precipitate the use of evidence and materials which they had no right to have, in the first place.

Now, in my points and authorities, I suggested to the court that what we really have here is not so much of a Fourth Amendment problem, although the Fourth Amendment problem is clearly there because it says it is, "The seizure of words, intangible items comes within the purview of the Fourth Amendment." So it doesn't matter what Congress may have tried to interpose as a way to get around it, if the way to get around it comes in conflict with the Fourth Amendment and the rights which have been enumerated under that Amendment by the United States Supreme Court, then insofar as those rights are interfered with the statute is void and the Government cannot use the evidence for any [22] purpose whatsoever.

THE COURT: Didn't the court in Berger—as I recall the court reversed the lower court in that case in which a wiretap was accomplished on the approval of the district attorney.

As I recall, didn't the Supreme Court of the United States say in Berger that that was insufficient, that a wiretap on such orders would be unconstitutional. That it required something in the way of court approval or some showing before the court before a wiretap would be accomplished? Isn't that what it said?

MR. MARKS: Well,—

THE COURT: Doesn't this statute comply with that, in effect, with the Berger case, with the comments of the Supreme Court in Berger?

MR. MARKS: Absolutely not, because that was only one ground on which Berger was reversed. Although that was the articulated ground, they also went into a large discussion in Berger as to the scope and extent of the search, which is a general search. The length or duration of the permitted wiretap.

THE COURT: That is all covered in the statute, the length and duration.

MR. MARKS: That is right. But the point is that the lenght and duration is the same as the general [23] warrants which were condemned a long time ago. In other words,

the Government can hear under the—if that are using the statute as their pretext tap a man's line for thirty days and everybody he talks to, his doctor, his priest, his lawyer, his confessor, his most innermost protection, which he believes is privacy, is his and his alone.

THE COURT: That can't be used against him if on a motion to suppress the court decides that it was improper, on a motion to suppress.

MR. MARKS: If it can't be used against him, that is the whole point to—

THE COURT: On a motion to suppress in an adversary proceeding.

MR. MARKS: That is right.

THE COURT: We don't have that here. We have a proceeding before the grand jury, which is not an adversary proceeding.

MR. MARKS: Well, that – no, no, no, no. The adversary proceeding on the motion to suppress is the adversary proceeding permitted to the defendant to come in and challenge the probable cause, not the adversary proceeding of a court trial after he has been indicted.

What is it that permits the Government to invade somebody's privacy, is it the good faith of the Government?

[24] I don't believe there is such a thing.

THE COURT: It is the statute that allows it.

MR. MARKS: Well, if the statute allows something that the Fourth Amendment prohibits, that is unconstitutional and that the Government cannot use. That is one of the attacks we have here.

It is to me apparent that that is what is happening, and the Government is saying—and it is clear what they are saying is, "Let us hurry in and get all that information we can under the statute. Don't let anybody challenge it. Let's have all the secret grand juty proceedings in which we can gather evidence in violation of all these rights and then we'll say, 'Well, we are sorry,' and maybe the indictments won't come out, but we will have all the leads we need, all the information we need and nobody has been hurt because due process has been observed." I think that is a bunch

of–to use the euphonism, I think it is a lot of hogwash. It is obvious from the Government's pleadings what they want and what–

THE COURT: All right. Go ahead. Do you have anything further?

MR. MARKS: Yes. This other proposition is, and this court I know just yesterday–I think it had some argument with respect the First Amendment. Now, the First Amendment affords greater protection than the [25] Fourth Amendment. At least as far as I read the Supreme Court cases.

In this area you have invaded or the statute has invaded the rights to free speech. It has, in fact, imposed what I consider to be a prior restraint, just in the way that any statute which stops somebody from speaking imposes a prior restraint. Any governmental action which prevents somebody from speaking imposes a prior restraint.

I know now that the court is familiar with Blount V. Rizzi because, as I say, I met Mr. Fleishman in the hall yesterday and–

THE COURT: Rosenthal?

MR. MARKS: Mr. Rosenthal. I know they were arguing a case involving the First Amendment, Blout v. Rizzi, a very important case. If you take the proposition of Blout v. Rizzi–

THE COURT: You are using that by argument in analogy. It didn't involve wiretap.

MR. MARKS: No, but it involved the use of mails–

THE COURT: I say you are arguing by analogy. It didn't involve wiretap.

MR. MARKS: That is correct.

THE COURT: All right.

MR. MARKS: Incidentally, speaking about [26], wiretap, your Honor, before I get away from the subject, I have a case, Bubis–B-u-b-i-s–v. U.S. which I just came across, which is a Ninth Circuit case. In my understanding of that case–I will have to check it out–the Ninth Circuit dismissed

an indictment which was brought as a result of an illegal wiretap. So there is inherent power in this court to go behind—if that case stands for what I think it stands for—I will have to go to the library to find it—if it does, it stands for the proposition this court has the inherent power to decide whether there is an illegal wiretap and whether that infected the grand jury proceedings.

What you are not allowing here, and that is why I am discussing Blount v. Rizzi, is a prior adversary hearing which the Government wants to avoid at all costs, to make a determination as to whether or not the search warrant, that is to say, the application for a wiretap, which is a search warrant with an affidavit—and that is all this statute says it is—you are not permitted to challenge that search warrant before you go in and are questioned about what you said.

Now, in Blount v. Rizzi the Supreme Court reemphasized again the proposition that the mail—and that is all the analogy I have—is like your own tongue, and the minute you stop the mail you stop speech.

[27] When you go into the telephone situation, a man wants to call his lawyer, his priest and he knows that there is a possibility that he is being overheard or tapped by the Government, he therefore is restrained from speaking on the telephone, which is just as much a right to talk as he has to dend by the mails. And the Supreme Court in Blount v. Rizzi said that at the very least if you are going to stop it this way, if you are going to impose a prior restraint on speech you have to act with the utmost dispatch in permitting a challenge to the Government action and the Government has to take each and every step affirmatively.

In other words, what this statute must provide, in my opinion, in order to be constitutional, consistent with the First Amendment, is that immediately upon the return of the tap and its intended use by the Government there must be a motion by the Government to have the person informed that he was tapped and to have a challenge permitted as to the validity of the tap based upon the affidavits and underlying probable cause, because everything up

to the point of seizing that man's words or the words of somebody else, which is what happens with Mr. Gelbard. Mr. Gelbard's phone was tapped, your Honor. You can use any kind of sophistry or sophistication you want, and try and twist it and turn it, but Mr. Gelbard, the minute he talked to whoever he talked to on the phone, whose phone had his [28] phone tapped. Plain and simple.

His phone was tapped, his conversation was overheard. It is now going to be used and they admit it is going to be used because they want to use the transcripts to refresh his his recollection.

Now, why should a person whose privacy has been invaded whose telephone has been tapped without a warrant, not be able to challenge the validity of that tap, the prior restraint, the restraint on his speech prior to the Government being able to use it.

The whole tenor of the statute, and it is just on its face plain that the Government—and I mean the Government, meaning the executive branch, who tries to make arrests and investigations, wants to have a way to invade privacy that they can do under color of law and show some kind of respectability about it so the can say, "Look, we tapped your wire but we got a court order for it and now we will use the evidence and maybe we'll lose but right now we have sure got a nice tool." And if the Government has that evidence and that evidence is lawfully obtained they have got five years to file a complaint. Grand jury investigations don't get stale.

This court is very familiar, because right in this jurisdiction they had a grand jury proceeding going on for six months in the Friars Club case cantemporaneously [29] with the trial. Six months that grand jury went on and nothing got stale and they just called in witness after witness and they have had a years's grand jury, two years' grand jury, thae extend them. The only reason for their wanting to hurry is so they can use the evidence, get the witnesses, get the testimony and then if it is unlawfully seized, "Gee, we are sorry but we won't use it again." And even that

the court knows is not a fact because the Government, the agents to whom the information is transmitted will use it in their investigation and eventually the Government will come up and say, "Well, yes, there was an illegal wiretap over here, but that wiretap was attenuated, the taint was attenuated because we had independent corroboration," and no defendant in this world can ever challenge that because there is no way to know the Government sources.

So I say if you are going to talk about due process, fair play, rights constitutional rights which supersede the rights of the Government to have information, which is what they want, then you must permit Mr. Gelbard to have a challenge to the wiretap which tapped his telephone, his conversations, the invasion of his privacy, and that means a right to have a hearing before a judge, with the underlying affidavits, so that he can say, "You didn't have a right to tap my phone and the minute you listened in, that [30] was an illegal tap, and, grand jury, I am sorry, you can't use it."

The last proposition I give to the court is this: The grand jury is an arm of the court, that is, the judiciary. It is not an arm of the executive. Over a period of years the executive has attempted to – and it has been extremely successful, for the most part, in usurping the functions of the court in exercising its jurisdiction over the grand jury. At some point the court has got to stop and say, "No, the dignity of this court is such that we will not permit tainted evidence to be used." I think that is what the Bubis case said, because this is the grand jury that belongs to the cou not to the executive branch, "And, therefore, we will be meticulous to see that the constitutional rights of persons are protected," because that is the reason the Constitution was started in the first place, was to protect the citizen, the individual from outrageous governmental executive intrusion. Not the court, the executive intrusion. And that is why the Constitution came around, the Bill of Rights, to protect them against the Government, meaning the executive.

This court has to protect its own dignity. A case in point as to that inherent power of the court is Saldona v. U.S. I don't remember—it has been cited. That was a case very much in point, where the Supreme Court [31] looked at the procedures that were going on, and said, "Just a minute, this is our court. The dignity of the court is at stake and we have inherent power to tell the Government, 'Don't do this,' " to the executive branch, "You cannot do this in our courts." It is just like the doctrine of dirty hands in an equity case.

So I submit, your Honor, that at this stage of the proceedings Mr. Gelbard has a right to have his transcripts, to examine them. Not in the grand jury, but right there.

He also should have an opportunity to examine the underlying affidavits, and until that time the Government, the power of the court to subpoena a witness who is to be used within the framework of the materials of evidence seized by this wiretap should not be utilized and the subpoena should be quashed.

One final thing. We had a motion before Judge Williams—

THE COURT: I was just going to ask you about that. What happened to that?

MR. MARKS: The requests that were presented to Judge Williams for the transcripts, to have a hearing, to have the underlying affidavits were summarily denied, according to my information, without any hearing whatsoever.

There is only one—oh, I remember. Yes, there [32] was one thing that Judge Williams gave to Mr. Gelbard, and that is when they made a search of Mr. Gelbard pursuant, as I recall,—I think they made a search pursuant to the warrant at some point, and they seized some money from Mr. Gelbard. That was ordered returned, but that was about all we got out of the motion.

THE COURT: The motion before Judge Williams is the same motion you are making now?

MR. MARKS: Yes, but we never had a chance or opportunity—I am not making a motion here. I am saying—

THE COURT: I know, but the same matter before me now as to Mr. Gelbard was before Judge Williams.

MR. MARKS: Essentially, except that we instituted the motion.

THE COURT: Before Judge Williams.

MR. MARKS: Before Judge Williams. The first process procedure was I asked for an order shortening time because Mr. Gelbard was supposed to testify two days later. This was denied.

The Government then continued Mr. Gelbard's testimony and then I put in the 17-day notice and that came up two days before the next grand jury hearing.

In the meantime I filed a writ with the Court of Appeals asking for a temporary stay, which was [33] denied because the time had passed. I still have that petition pending with the court, I think. I don't know what orders they took on it, the Court of Appeals.

In the meantime Mr. Gelbard was ordered to appear, so I had to give him the instructions which I thought were appropriate under the contested matter which is there.

Now, again I say it is hard to understand why the Government is unwilling to supply the information, except—and the only articulated reason is, "We don't want to supply the underlying information and the transcripts because they may fall in the hands of some unscrupulous defense attorney who will then fashion a story of the witness." And I—

THE COURT: Let's get back to Judge Williams.

MR. MARKS: Yes.

THE COURT: There was a motion made. You say it was denied. Weren't you notified of the fact it was denied?

MR. MARKS: I was in another court, your Honor. I was in San Diego in trial, as I recall. My partner told me—

THE COURT: That it was denied.

MR. MARKS: Yes, that it was denied.

THE COURT: Did you take any steps to get him relieved before the Court of Appeals?

[34] MR. MARKS: I haven't taken any steps yet because the Court of Appeals writ was already on file, and two days later we had Mr. Gelbard come in front of the grand jury, and then we had this proceeding. I am just sit-

ting here waiting. The next thing I want to do, after this court makes a ruling, is send a supplementary application up to the Court of Appeals and tell them what has happened. I don't know how this court is going to rule, because if it rules favorably it is moot.

THE COURT: All right. I will hear from the Government.

MR. THALLER: Your Honor, before we go on, before Judge Williams, he denied defendant's motions down the line. The only thing was that the Government volunteered to return the money that was seized from Mr. Gelbard.

THE COURT: I am not concerned about that. That is an extraneous—collateral to this issue anyway, returning the money.

MR. THALLER: The cases that were brought up by defense counsel talk about a search, an intrusion, a seizure of communications.

THE COURT: The thing that bothers me is if Judge Williams has ruled on this, why is the Government bringing it before me now, if Judge Williams has already ruled on it?

[35] You are coming up because he wouldn't be sworn and answer questions, is that the reason?

MR. THALLER: That is right, your Honor.

THE COURT: What about this oath matter?

MR. THALLER: Your Honor, it is my understanding that either a man must make an oath or affirmation by statute. Either he takes an oath under God or he says, "I will tell the truth."

What the Government is interested in is that Mr. Gelbard come before the grand jury—

THE COURT: You mean before the grand jury. Do you have the statute you are talking about?

MR. KING: Your Honor, it is in Title 28. I am sure it authorizes an oath to be taken in any proceedings in a court of the United States.

THE COURT: I think that is right. See if you can find it here.

All right. Go ahead.

As I understand it, all you are asking now is that you want me to affirm Judge Williams' order, is that what you are saying?

MR. KING: Your Honor, as I recall—I may be wrong about this—I was told the rest of the matters, besides the money that was returned to him, were withdrawn from Judge Williams' consideration that time.

[36] Am I correct?

MR. THALLER: No, no, he denied the defense motions for all this material.

THE COURT: Then why are you bringing the matter here? I mean, if he was denied it, that motion has already been acted upon, hasn't it?

MR. KING: As to the witness Gelbard it has, your Honor.

THE COURT: Yes.

MR. KING: In that case then we would only ask that the witness be instructed to take the oath and testify or to exercise his privilege, as the case may be.

THE COURT: There must be a minute order in that file if Judge Williams denied it. You had better get the file and let's see what the order was, if there is any question about it.

MR. THALLER: All right, your Honor. I will do that right now.

MR. KING: As to the witness Parnas, this is the first time he has raised the issue, to my knowledge.

THE COURT: Yes, it wouldn't be a matter that has been raised before.

MR. KING: Aside from the oath several things were raised in the course of Mr. Marks' presentation.

THE COURT: He is raising the constitutionality [37] of the statute.

MR. KING: Yes, your Honor. I would just simply like to point out to the court that in every instance practically that he was arguing he was going from the premise of an unlawful search.

Now, at this point the search or the interception, if you will, is presumptively lawful, conducted under warrant,

under the supervision of a judge of this court and under a warrant issued by that judge. It is presumptively legal at this time.

Now, maybe if he wants to contest that, this is neither the time nor the place to do so. If there is much presumed bad faith on the part of the Government in Mr. Marks' argument, I don't think there is a great deal of comment necessary on that. I think it should be evident to the court that the Government is proceeding with all deliberate speed with its investigation, but at the same time is granting ample time to every witness that needs it to seek counsel and to do what he thinks he needs to do to protect himself.

As to the First Amendment argument, there is certainly no chilling effect on free speech here. There are procedural safegaurds in the warrant to such an extent that the ordinary citizen need ordinarily have no fear of having an interception conducted on his phone.

[38] The requirements of probable cause are not only there but they are confined to certain particular crimes. You have procedural safeguards as to inventory, and so forth.

As to the notice to the person tapped, of course, that is a decision that is made by the judge who is supervising the tap. It is not a decision that is made by the Government. Everything that Mr. Marks raises comes within the province of this court, really. It has been supervised by a judge of this court.

He mentions that Mr. Gelbard, who was tapped when there was no probable cause shown as to Mr. Gelbard. Well, even under a search warrant it is possible for the premises of an innocent third party to be searched to find contraband or evidence of a crime hidden there by the prospective defendant in the case. That's just one of the things that go along with the procedures that we have. It is rare, but it happens.

Mr. Marks argues that the Government is seeking attenuation of this evidence. I would dispute that we were seeking attenuation of this evidence. I would dispute that we were

seeking it. But even assuming that we were seeking it, we could not obtain it as to either the witness or the person whose phone was tapped. And I think the court should concern itself only with those two parties.

Now, it is possible we might get some attenuation under Wong Son or something like that. But [39] that would not concern either the witness or the party whose phone was tapped.

THE COURT: What about the legislative history? Nobody has mentioned that.

MR. KING: The legislative history might clearly indicate, your Honor, there is no contemplated motion to suppress to be made at the time of the grand jury hearing.

THE COURT: What the history says is that the proceedings—hearing and proceedings as used in the statute do not apply to grand jury proceedings.

MR. KING: That is correct, your Honor.

THE COURT: Why didn't the statute so provide?

MR. KING: Your Honor, to a great extent I think it does provide it. Because the statute says that you have to be a party to raise it. And I don't think that there is a party as such to a grand jury proceeding. It is an ex parte proceeding. There is no party to a grand jury proceeding, so I think the statute is quite clear.

THE COURT: All right. Go ahead. Anything further?

MR. KING: Nothing, unless your Honor has further questions.

THE COURT: I don't have any further questions. I would like to see what this order provides.

MR. MARSHALL: May I have another moment, your [40] Honor?

THE COURT: Yes.

MR. MARSHALL: I didn't realize you were going to get into the constitutional features of the statute, and I am not going to belabor the point.

THE COURT: I don't know that I am.

MR. MARSHALL: Well, you mentioned the Berger case and the attitude of the statute to comply with the Berger case.

THE COURT: Yes.

MR. MARSHALL: There is one more significant decision that was discussed at length in the legislative history and it is significant t oday, and that is the Katz case which Mr. Marks presented before the Supreme Court.

THE COURT: Yes.

MR. MARSHALL: In the Katz case—

THE COURT: I know the case. The electronic device on the telephone.

MR. MARSHALL: Yes, but the significant point in the Katz case was that the officers made a very strong effort to obtain one side of the conversation only. That is the very point I am raising before the court. They walk in on an application and get an order to tap X. There is probably a probable cause, your Honor, showing at that time. How about the dozens of people that talk to him? [41] This is my point. We don't have a chance to speak unless we are afforded notice and an opportunity to be heard.

Now, the statute does have certain procedural safeguards built into it, notably Subsection D of 2518. Now, if that notice is given, then a man can do something to bring the matter before the court. If he is never going to be indicted or if there is no indictment proceedings at all, no criminal action whatsoever contemplated against the man, is he totally without legal redress? Does he have any rights at all? That is the point I am making. I only want to be heard, just an opportunity to read the order, the application,—

THE COURT: I understand what you want.

MR. MARSHALL: But I can't see how the Government is out anything at that point.

THE COURT: Namely, that is your argument.

MR. MARKS: May I request one thing? I am in trial in Judge Hauk's court across the way. I don't—I am sure Mr. Gelbard would consent for the purpose of the rest of this hearing and the orders, any orders that the court might make, that Mr. Marshall could sit in for me.

My problem in this: If the court makes some orders with respect to Mr. Gelbard, I am in trial and I can't stand at the

jury room. What I am asking is I be given at least a week and hopefully two weeks in which he is ordered [42] to return back to the grand jury in order to make his appearance and do what the court orders. Today it is impossible–

THE COURT: Counsel being engaged, and so forth, you might have to be excused, you know, if you have somebody up there. I don't know what the situation is.

The grand jury comes back in a week? What is the position of the Government? You want to interrogate them today?

MR. KING: Yes, your Honor, we do want to interrogate them today. Bringing these people back here–

THE COURT: I am not going to delay it, Mr. Marks.

MR. MARKS: I would like to have the Government make a statement of why they have to do it today when this grand jury meets every week and this investigation has been continuing for, as far as I know, two or three months.

THE COURT: I suppose that is the reason, I don't know.

MR. MARKS: And it probably will be continuing for another two or three months in the future.

MR. KING: Your Honor, it may be quite possible–Mr. Thaller's case that he could hear him next week, I don't know, but I do not want to make a commitment to him, until I know he wants the grand jury back here next week. [43] I think it would be a gross inconvenience to the grand jury.

THE COURT: What about yours?

MR. KING: In my particular case, your Honor, I don't think we have the problem. I think Mr. Marshall is here, ready to represent his client if you order him to testify. That I will take care of today and I intend to wind up this phase of my grand jury presentation today, if I can do so.

THE COURT: I don't know. I want to see this order. Have you found that provision in the–

MR. THALLER: I just started looking it up.

THE COURT: Is Mr. Gelbard here?

MR. MARKS: Mr. Gelbard.

(Mr. Gelbard stands.)

THE COURT: Is it agreeable with you, Mr. Gelbard, that Mr. Marshall represent you in this proceeding if Mr. Marks leaves?

MR. GELBARD: Yes.

THE COURT: We are talking about this proceeding now.

MR. GELBARD: Yes.

THE COURT: Is it agreeable with you?

MR. GELBARD: Yes, sir.

THE COURT: All right. Then if that is the case, Mr. Marks, you may be excused and Mr. Marshall will [44] represent him. I don't know what the position of the Government will be so far as Mr. Gelbard appearing before the grand jury.

MR. MARKS: Thank you. I will be right across the hall.

THE COURT: We will take a short recess now, until counsel comes back with that order.

(Recess taken.)

THE COURT: Was there more than one motion you made before Judge Williams, Mr. Marks?

MR. MARKS: I thought that I had attached to my moving papers here all of the moving papers that I submitted to Judge Williams. Perhaps I am wrong.

THE COURT: There is a Motion to Quash Search warrant and For Return of Property Unlawfully Seized.

MR. MARKS: Right, under Rule 41.

THE COURT: All right. Now, is that the motion we are talking about?

MR. MARKS: That is the motion.

THE COURT: Well, you raised the issue of the grand jury transcript under the motion?

MR. MARKS: What I raised was the point that the warrant—this was the general tenor of my motion, that there were search warrants issued which were based upon unlawful wiretaps, and Judge Williams denied the specific [45] motion to quash the search warrant for, I assume, every reason that was raised.

THE COURT: You submitted this Blott memorandum before him, too?

MR. MARKS: No, your Honor.

THE COURT: You did not?

MR. MARKS: No, I did not. I didn't have the Blott memorandum.

THE COURT: This started, though, with Judge Williams and then it comes before me.

MR. MARKS: Right. Now that my recollection is refreshed, your Honor, the motion before Judge Williams although they raised some of the issues raised in this memorandum, were not squarely in point with the questions which are discussed here. In other words, I raised as a preamble to the invalidity of the warrants that the information that they obtained, in order to have an affidavit in support of a search warrant, was obtained by an unlawful telephone tap. But I was unable to have a hearing before Judge Williams to go into the question of whether or not the telephone taps underlying probable cause were unlawfully seized because we didn't have the affidavits to support the tap. So I would represent to the court in my opinion the issues are different. The decision was not ruled upon by Judge Williams, except insofar as he impliedly passed on the [46] statute as being unconstitutional, the wiretap statute, and that was raised specifically in my motion.

THE COURT: What did you find? Did you find the statute there?

MR. KING: Rule 6(c) of the Rules of Criminal Procedure authorize the foreman of the grand jury to administer an oath and empowering him to administer that oath.

THE COURT: All right.

MR. MARKS: I have no doubt, your Honor, that he has the power to administer oaths. The question is where does it provide that a court has the power to order a witness to testify under oath, because nowhere in the statutes of the United States is there anything that I can find, statutes or rules, that says a witness testifying must testify under oath or affirmation.

THE COURT: All right, gentlemen. I am ready to rule.

MR. MARKS: I am called, your Honor.

THE COURT: All right.

(Mr. Marks retires from the courtroom.)

THE COURT: In the Parnas matter, Rule 9, of course, applies only to the application and the order. Parnas claims he is a party aggrieved.

It doesn't appear to me that this is the time before the grand jury that these matters are to be litigated. [47] The party has the right to refuse to answer under his Fifth Amendment right, and in any subsequent matter he can move to suppress the wiretap. He will be confronted with it, in all probability, at the time he goes before the grand jury, and he can talk to his lawyer about the questions that are asked and what appears in the transcript, insofar as it is divulged to him.

But the long litigation that would be involved in these proceedings being held now I don't think is appropriate. I think the Costello case and the Blue case so indicate.

The Costello case says, "If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury."

Mr. Marshall has set forth pertinent portions of the Blue case. I have read the Blue case. The Blue case says:

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be [48] entitled to suppress the evidence and its fruits if they were sought to be used against him at trial."

And then the footnote, "It does not seem to be contended that tainted evidence was presented to the grand jury; but in any event our precedents indicate this would not be a basis for abating the prosecution pending a new indictment, . . ."

Now, it is true in the Blue case that the matter there would have terminated the prosecution of the offense. But I think the statements there are pertinent as well as the statements in the legislative history of the case, where, as to both 9 and 10, it appears very succinct by statements in the proceedings before the Senate Committee, that "'Proceeding' as used in the statute is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing."

They are talking about Rule 9 there, but they make comparable comments under Rule 10 where the court says, "Because no person is a party as such to a grand jury proceeding the provision does not envision the making of a motion to suppress in the context of such a proceeding itself."

[49] I think the rights of a witness are sufficiently protected. As to the constitutionality of the statute, of course, that is another matter, but it has been held by the Florida court to be constitutional.

I gather that Judge Williams in considering the motion that Mr. Marks made likewise considered the issue of the constitutionality of the statute.

I would hold that it was constitutional in the circumstances. It appears that legislature made every effort to comply with the ruling of the Supreme Court in Berger. So the witness Parnas is ordered to answer questions before the grand jury.

As I understand, he has refused to answer questions, is that right?

MR. KING: Not at this point, your Honor. He simply asked an opportunity to be heard before he was called.

THE COURT: Is he here?

MR. MARSHALL: Yes, your Honor.

(Mr. Parnas stands.)

THE COURT: Mr. Parnas, you are ordered to appear before the grand jury and answer the questions that are pro-

pounded to you, and if you fail to answer them, of course, the court may adjudge you in contempt. If you are adjudged in contempt, why, you are subject to imprisonment.

You have, of course, the right to exercise your [50] Fifth Amendment rights with respect to self-incrimination, and I am sure your counsel, Mr. Marshall, has fully advised you in that regard.

MR. MARSHALL: Your Honor, before we go on to Mr. Gelband; may I, in the interest of expediency, because I think the point is not frivolous, ask what the court's disposition may be if Mr. Parnas respectfully relied on his position before this court, if he were held in contempt.

I am asking primarily about the question of bail.

THE COURT: I do not grant bail in a contempt for witnesses before the grand jury. I will grant you a short stay in which you could go to the Court of Appeals if you saw fit.

MR. MARSHALL: One week?

THE COURT: Well, in view of the fact that this involves new constitutional matters and matters which there isn't a lot of precedents for I would be inclined to grant the witness a stay.

Now, if your grand jury will be back in a week, why, then, that would be—there would be no reason to make it shorter than that.

MR. MARSHALL: May I suggest a procedural solution?

MR. KING: Your Honor, I don't think we have an [51] appealable order until such time as he is held in contempt.

THE COURT: I think that is right, but he is asking what I would do.

MR. MARSHALL: That is right. I am trying to do it expeditiously. My client is not a healthy man and I don't want him to waste one day in jail if it is that important.

THE COURT: All right. I have indicated to you what I would do if he is found in contempt.

MR. MARSHALL: One week's stay. One more question, your Honor. Would he have an opportunity to purge

himself of that contempt if denied bail by the Circuit Court?

THE COURT: He is ordered in jail until he answers the questions.

MR. KING: Civil contempt.

THE COURT: It is a civil contempt. If he answers the questions, why, he has no problem at all.

MR. MARSHALL: I understand that, your Honor, but the order is, I understand, that you will stay your contempt citation imprisonment until I have an opportunity to present it to the Court of Appeals.

THE COURT: I am going to specify the time. I am not just going to say that it is stayed until you present it.

[52] MR. MARSHALL: I understand that, your Honor.

MR. KING: May it please the court, for the purposes of the record, you referred several times in your decision to Rules 9 and 10. I take it you were referring to Subsections 9 and 10 of the Act.

THE COURT: Yes, I was referring to Subsections 9 and 10 of the Act.

MR. KING: Of 10 USC 2518?

THE COURT: Yes, I was.

As to Mr. Gelbard, I find that he is required to appear before the grand jury and that he is required to be sworn and answer the questions propounded by the grand jury, for the same reasons that I have given with respect to Mr. Parnas.

Mr. Gelbard, you are ordered to appear before the grand jury and you are ordered to be sworn and to answer the questions of the grand jury. If you do not, you will be brought back before me and the issue of contempt will then be determined, and if you are found in contempt, why, the court will order you to jail until you answer the questions or during the life of the grand jury, whichever is shorter.

I believe that covers the matter now.

MR. KING: Thank you, your Honor.

(Whereupon, at 11:00 o'clock a.m., Wednesday, February 17, 1971, an adjournment was taken.)

[2] LOS ANGELES, CALIFORNIA; WEDNESDAY, FEBRUARY 17, 1971.
11:15 A.M.

THE FOREMAN: Raise your right hand, please.

You do solemnly swear the testimony you are about to give before this Grand Jury shall be the truth, the whole truty, and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE FOREMAN: Be seated.

SIDNEY PARNAS,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. KING:

Q. Would you give your name for the Grand Jury, please, sir. A. I have something over here I would like to read, if I may.

Q. This is before or after you give your name? A. I don't know what I am supposed to do.

Q. Do you have counsel– [3] A. Never been in the Grand Jury before. The attorney gave it to me. I have never been before the Grand Jury in my life. He told me–

Q. Sir, this is your third appearance before this Grand Jury. A. I know, sir, I know that very well.

Q. Do you want to consult with your counsel before you answer the question as to what your name is. A. My name is Sidney Parnas.

Q. You are the same Sidney Parnas that has appeared before this Grand Jury, sir? A. Would you let me ask him this question, sir?

Q. Certainly, I think that would straighten things out faster.

(Whereupon the witness left the Grand Jury room at 11:20 and returned to the Grand Jury room at 11:23.)

THE WITNESS: Yes, sir.

MR. KING: I forget what the question was that I asked you.

THE FOREMAN: Was he the same Sidney Parnas that appeared before?

THE WITNESS: Yes, sir.

BY MR. KING:

Q. What is your present residence address, sir? [4] A. 77 Seventh Avenue, New York City.

Q. You have an attorney here today, sir, do you not? A. Yes, sir.

Q. And his name is Adrian Marshall? A. Yes, sir.

Q. Is Mr. Marshall outside the Grand Jury room door? A. Yes, sir.

Q. You are free to consult with him, you realize that, do you not, sir? A. Yes, sir.

Q. You realize you are free to consult with him at anytime you want to? A. That is right, sir.

Q. In connection with your prior appearances before this Grand Jury and of having been advised by your counsel, you are aware, are you not, that you have a right to refuse to answer any question if you honestly believe that the answer to that question would tend to incriminate you? A. Sir, I might as well read this statement. As I said, I am an amateur in this. I know that is none of your business or you don't care whether I am an amateur, pro or anything. I just want to read this statement.

Q. Have you been advised to, what I told you in this Grand Jury and previously now, that if you want to ask [5] your attorney whether or not you should answer, that you may leave the Grand Jury room? A. What was that, sir?

Q. Have you been advised by your attorney and on your prior appearances you need not answer any question if you honestly believe the answer to that question would tend to incriminate you, sir? A. Excuse me.

(The witness left the Grand Jury room at 11:26 and returned to the Grand Jury room at 11:28.)

THE WITNESS: What was your question, sir?

BY MR. KING:

Q. Have you been advised in your prior appearances before this Grand Jury and by your counsel that you need not answer any question the answer to which you believe might tend to incriminate you? A. Yes, sir.

Q. You do realize that you are testifying under oath here today, sir. A. Yes, sir.

Q. You do also realize if you make a false statement to this Grand Jury while under oath you are subject to prosecution under the statutes relating to perjury and false declarations. Do you understand that? A. Yes, that I—only common sense. I guess I do [6] understand it.

BY MR. KING:

Q. Now, what is your present occupation, sir? A. Now, can I read this to you, sir?

Q. You may. A. Thank you very much.

I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any question in which you may utilize overheard communications in which I engaged until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

Q. Now, sir, were you reading from a paper at that time? A. Yes, sir, right now, sir.

Q. Pardon me? A. From right now.

Q. All right. Was that paper supplied to you by your attorney Mr. Marshall? A. Yes, sir.

[7] Q. Now, is it your intention to read that paper everytime I ask you a question concerning your occupation and your association? A. Today, sir, yes, sir.

Q. For the purposes of the record, then, sir, I will ask you a few additional questions, and you may read that if you wish to do so; is that clear? A. Yes, sir.

Q. Do you know Mr. Jerome Zarowitz? A. You want me to read that again, sir?

Q. Please do, sir, if that is your intention and if that is your advice, please do so. A. For the time being I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any question in which you may utilize any overheard communications in which I engaged in until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the over heard material is disclosed before the Grand Jury.

Q. All right, sir. Now, to shorten this thing, from here on, if you intend to make that same statement to [8] any further questions, would you please simply say that "I refuse to answer on the same grounds." A. Yes, sir.

Q. Do you know Mr. John Baborian? A. Same thing, sir.

Q. You refuse to answer on the same grounds? A. Yes.

Q. All right. What ownership does Mr. Jerome Zarowitz have in Caesar's Palace Casino in Las Vegas? A. Same thing, sir. How do you want me to answer that?

Q. Just say, "I refuse to answer on the same grounds"– A. I refuse to answer on the same grounds.

Q. So it will be clear to anyone that examines this record just what we are doing.

Have you received at anytime any money, funds, credits or other things of value from Mr. Jerome Zarowitz? A. Same thing goes as I said before about this. I better write it down, because otherwise I will–

Q. You refuse to answer on the same grounds? A. I refuse to answer on the same grounds. All right, sir.

Q After you received this money, credit or other thing of value from Mr. Zarowitz, did you thereafter pass on [9] all of any portion of that money to Mr. John Baborian? A. I refuse to answer on the same grounds, sir.

Q. Are you aware that Mr. Jerome Zarowitz lives in Palm Springs, California? A. I refuse to answer on the same grounds.

Q. Is your occupation the manager of the Caesar's Palace reservation office in New York City? A. I refuse to answer on the same grounds.

Q. Are you aware that Mr. John Baborian is a resident of Providence, Rhode Island? A. I refuse to answer on the same grounds.

MR. KING: All right, sir. Mr. Grand Jury Foreman, would you excuse the witness to be brought before Judge Crary's court this afternoon at a time which I will later convey to his counsel.

THE FOREMAN: Sure. You are excused until this afternoon at 1:30 at which time you will reappear here.

THE WITNESS: Appear?

THE FOREMAN: Reappear here.

THE WITNESS: Right here, sir?

THE FOREMAN: At 1:30, please.

(Witness leaves Grand Jury room.)

(After noon recess the proceedings were reconvened at 1:30 P.M. and the witness, Sidney Parnas reappeared before the Grand Jury [10] and testified further as follows:)

EXAMINATION

BY MR. KING:

Q. Now, sir, for the purposes of the record, you are the same Mr. Sidney Parnas who appeared earlier this morning before this Grand Jury, and you were sworn at that time; is that correct? A. Yes.

Q. At that time you were asked certain questions, and you refused to answer those questions on grounds which you read to this Grand Jury at that time; am I correct? A. That is right.

Q. Since that time, have you had an opportunity to discuss those specific questions with your attorney? A. No,

I haven.t seen him at all. Just told me to read the same thing all over again in case you asked me.

Q. So it is not going to make any difference to you in answering those specific questions? A. No, that is just what he told me.

Q. All right, sir, I am going to go back over each one of those specific questions, and at this time, I will ask the Grand Jury Foreman to direct the witness to answer that question.

[11] Madam Reporter, would you please read the first question that we had concerning, I think his occupation.

(The record was read as follows:

"Q. What is your present occupation, sir?")

THE FOREMAN: Would you please answer that question, Mr. Parnas.

MR. KING: Would you order him to answer it.

THE FOREMAN: You are ordered to answer the question, Mr. Parnas.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. The same grounds you assigned this morning? A. Yes sir.

Q. Do you rely on any other privilege? A. I beg your pardon?

Q. Do you rely on any other privilege? A. I don't know what you mean.

Q. Like the Fifth Amendment or something like that or it is only this ground? A. It is only this ground as far as I know.

Q. Do you want to consult with your counsel? A. You would say I am better off; is that right? I will go ask him. What is the question?

Q. Do you rely on any other privilege such as the Fifth Amendment? [12] A. Outside of this?

Q. Yes.

(The witness left the Grand Jury room at 1:34 and returned to the Grand Jury room at 1:35 P.M.)

THE WITNESS: At this time, sir—

BY MR. KING:

Q. For the record, sir, you are the same Mr. Sidney Parnas who was just in this room? A. Yes.

Q. You left to talk with your counsel? A. Yes.

Q. Have you talked with your counsel? A. Yes, sir.

Q. Now, at this point I am going to have the reporter read the question to you that was asked previously about your occupation, is that clear, sir? A. Yes.

(The record was read as follows:

"Q. What is your present occupation, sir?")

MR. KING: Now, Mr. Foreman, would you instruct the witness and order the witness to answer that question.

THE FOREMAN: Mr. Parnas, you are ordered to answer the question.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. The same grounds you assigned [13] this morning? A. That is right, sir.

MR. KING: Madam Reporter, would you continue to the next question, please.

(The record was read as follows:

"Q. Do you know Mr. Jerome Zarowitz?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Do you rely on any other privilege, sir? A. No, sir, not at the present time.

MR. KING: All right. Would you continue to the next question, Madam Reporter.

(The record was read as follows:

"Q. Do you know Mr. John Barborian?")

THE FOREMAN: Mr. Parnas, you are instructed to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Do you rely on any other privilege? A. Not at this time, sir.

MR. KING: Madam Reporter, would you continue to the next question, please.

(The record was read as follows:

"Q. What ownership does Mr. Jerome Zarowitz have [14] in Caesar's Palace Casino in Las Vegas?")

THE FOREMAN: You are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. That is the same grounds that you assigned this morning? A. Right, sir.

Q. Are you relying on any other privilege? A. No, not at the present time.

MR. KING: Madam Reporter, would you continue to the next question, please.

(The record was read as follows:

"Q. Have you received at anytime any money, funds, credits or other things of value from Mr. Jerome Zarowitz?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you gave this morning, sir? A. Right, sir.

Q. Do you rely on any other privilege? A. Not at the present time, sir.

MR. KING: Madam Reporter, the next question.

(The record was read as follows:

"Q. After you received this money, credit or other [15] thing of value from Mr. Zarowitz, did you thereafter pass on all or any portion of that money to Mr. John Baborian?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you assigned this morning, sir? A. That is right, sir.

Q. Do you rely on any other grounds or privilege? A. Not at the present, sir.

MR. KING: All right, sir.

Madam Reporter, would you read the next question.

(The record was read as follows:

"Q. Are you aware that Mr. Jerome Zarowitz lives in Palm Springs, California?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you assigned this morning? A. Yes, sir.

Q. Do you rely on any other privilege, sir? A. Not at the present, sir.

(The record was read as follows:

"A. Is your occupation the manager of Caesar's [16] Palace reservations office in New York City?")

THE FOREMAN: Mr. Parnas, you are ordered to answer the question read by the reporter.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Those are the same grounds that you stated this morning when you were here, sir? A. Yes, sir.

Q. Do you rely on any other privilege, sir? A. Not at the present, sir.

Q. This question wasn't read, so I will ask this question: Are you aware, sir, that Mr. John Barborian is a resident of Providence, Rhode Island?[

THE FOREMAN: Mr. Parnas, you are ordered to answer the question asked by Mr. King.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. KING:

Q. Would you read those grounds into the record for the purposes of the record before we take it downstairs. A. I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any questions in which you may utilize any overheard communications in which I engaged [17] until such time as I have been given an opportunity to review the application for the wiretap order, the wiretap itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

Q. Everytime that you have said the grounds you assigned this morning, those were the grounds that you assigned this morning; is that correct, sir? A. I beg your pardon?

Q. All of the other questions that we have gone over before we hit this last one you stated that you refused to answer on the grounds that you assigned in this morning's session, what you have just read was— A. Just read, yes.

Q. —was what you assigned this morning?

Mr. Foreman, would you excuse the witness until such time as the attorneys can bring this up in Judge Crary's courtroom.

THE FOREMAN: You are excused and to report to courtroom 3.

THE WITNESS: Do you want me to wait out here now?

THE FOREMAN: Yes.

[2] LOS ANGELES, CALIFORNIA; WEDNESDAY, FEBRUARY 17, 1971. 1:50 P.M.

THE FOREMAN: You do solemnly swear that the testimony you are about to give before this Grand Jury shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: That's right.

DAVID GELBARD,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. THALLER:

Q. Please state your name and spell your last name. A. David Gelbard, G-e-l-b-a-r-d.

Q. Mr. Gelbard, are you the same David Gelbard that appeared before this Grand Jury on February the 3rd? A. Yes.

Q. What is your address, sir? A. 6681 Maryland Drive.

A JUROR: What city is that?

[3] THE WITNESS: Los Angeles.

BY MR. THALLER:

Q. Mr. Gelbard, this Grand Jury is conducting an investigation into the use of interstate facilities for the transmission of gambling information, and you have been subpoenaed before this Grand Jury because this Grand Jury believes that you have information which will be beneficial to them in their investigation.

I wish to advise you of your rights at this time; that you have the right to have counsel here and to consult with counsel. He cannot come into this room, but you may go out and consult with him at anytime.

Do you have an attorney here with whom to consult? A. Yes.

Q. What is his name? A. Mr. Marks.

Q. Burton Marks? A. Burton Marks.

Q. Okay, sir.

Now, you also have a right under the Fifth Amendment to refuse to answer any question which I might ask you and which you think that your answer might incriminate you. That is to say, could make you subject to criminal prosecution. However, the Fifth Amendment right, I wish to advise you, is not available for the reason that you don't [4] wish to answer a question because you just don't care to or that it might injure a friend. Your Fifth Amendment right is available to you so that you do not have to incriminate yourself.

Do you understand my explanation of those rights? A. Yes, sir.

Q. Mr. Gelbard, where are you employed? A. I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications in which I engaged which were intercepted by the Government pursuant to a wiretap order. I respectfully decline to answer any questions in which you may utilize any overheard communications in which I engaged until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

MR. THALLER: Mr. Foreman, would you order the witness to answer that question.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by Mr. Thaller.

MR. THALLER: Off the record one moment.

(Discussion held off record.)

[5] MR. THALLER: Let's go back on the record. You have been ordered by the Foreman—

THE FOREMAN: Are you refusing to answer on the same grounds?

THE WITNESS: Is that all I am supposed to say: "I refuse on the same grounds?"

BY MR. THALLER:

Q. Yes. A. I refuse on the same grounds.

Q. Mr. Gelbard, do you know a man named Perry Paul? A. I refuse on the same grounds.

Q. These are the same grounds that you read to us? A. Yes.

Q. I notice you read those grounds from a sheet of yellow paper. A. Yes.

Q. From whom did you receive the paper? A. Mr. Marshall.

Q. That is the attorney Adrian Marshall? A. Yes, the gentleman that is outside.

Q. He is asking on behalf of your attorney Burton Marks? A. Yes, Burton Marks, he is in court.

MR. THALLER: Off the record one second.

(Discussion held off record.)

[6] MR. THALLER: Mr. Foreman, would you order the witness, David Gelbard, to answer the question: "Do you know a gentleman named Perry Paul?"

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by Mr. Thaller.

THE WITNESS: I refuse on the same grounds

BY MR. THALLER:

Q. Mr. Gelbard, have you ever made wagers for Perry Paul?

[Mr. Foreman, would you order the witness to answer that question.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question posed by Mr. Thaller.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know a gentleman named Jerry Kilgore?

Mr. Foreman, would you order the witness to answer that question.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by Mr. Thaller.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, have you ever made wages with Sam Farkas or Anton Kaleel?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: Mr. Gelbard, you are ordered to answer [7] the U.S. Attorney's question.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know Jerry Kilgore?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by the U.S. Attorney.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know that Jerry Kilgore receives his line from Las Vegas?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: Mr. Gelbard, you are ordered to answer the question asked by the U.S. Attorney.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, do you know Frank Rosenthal?

Mr. Foreman, would you order the witness to answer.

THE FOREMAN: You are so ordered, Mr. Gelbard.

THE WITNESS: I refuse on the same grounds.

BY MR. THALLER:

Q. Mr. Gelbard, have you ever made wagers for Kilgore or Frank Rosenthal?

THE FOREMAN: You are ordered to answer the question, [8] Mr. Gelbard.

THE WITNESS: I refuse to answer on the same grounds.

BY MR. THALLER:

Q. What are those? A. What I have read in this paper.

Q. Would you read those grounds. A. I understand from the proceedings before the Court this morning that you intend to ask me questions which may be based upon oral communications to which I engaged which were intercepted by the Government pursuant to wiretap order. I respectfully decline to answer any question in which you may utilize any overheard communications in which I engaged until such time as I have been given an opportunity to review the application for the wiretap order, the order itself, and any conversations in which I engaged in order that I may make any appropriate motions before the overheard material is disclosed before the Grand Jury.

Q. Now, Mr. Gelbard, the grounds that you have just read, are they the grounds which were the basis for your refusal to answer all the questions this afternoon? A. This was the advice of my attorney.

Q. Are there any other grounds for your refusal to answer these questions? A. I would have to confer with my attorney first.

Q. Okay. Would you please.

(Whereupon the witness left the Grand [9] Jury room at 1:55 P.M. and returned to the Grand Jury room at 2:00 P.M.)

BY MR. THALLER:

Q. Mr. Gelbard, have you had occasion to consult with your attorney? A. Yes.

Q. Now, can you answer my question: Do you have any other grounds for which you are— A. Until further order of the Court, I am standing on these grounds.

Q. Okay.

Mr. Foreman, if you would excuse the witness and ask him to appear promptly in Judge Crary's court, right now.

THE FOREMAN: You are excused to report to courtroom 3 on the second floor.

(The witness leaves the Grand Jury room.)

Supreme Court of the United States

No. 71-110 ----October Term, 19--

David Gelbard and Sidney Parnas,

Petitioners

v.

United States

ORDER ALLOWING CERTIORARI. Filed December 14 ----------, 19 71

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ----------. Circuit is granted.

FILE COPY

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term .....

No. 71 - 110

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term .....
No. .....

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Sidney Parnas and David Gelbard, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming an order of the United States District Court for the Central District of California that they make answers to questions put to them before a Grand Jury to the United States or be committed for civil contempt.

Opinion Below.

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 8, 1971. A timely petition for rehearing was denied on June 23, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented.[1]

1. Whether 18 U.S.C. §2518(9), which mandates disclosure of the fruits of wiretaps before the use of such fruits in any "hearing" or "proceeding", applies to a federal grand jury so as to require the government to make such disclosure to a witness subpoenaed before such a grand jury when the government intends to use the wiretap material in questioning the witness as the Third Circuit has held *en banc* in *In re Egan*, 39 U.S.L.W. 2724 (6-22-71); further, whether, following disclosure, the witness has the right to move under 18 U.S.C. §2518(10) to prevent such use, as the Court also held in *Egan*.

2. Whether if 18 U.S.C. §§2518(9) and (10) do not provide a grand jury witness the right to disclosure and to a hearing to determine the legality of the wiretap and to suppress its illegal fruits, the unambiguous protection offered by 18 U.S.C. §2515 to grand jury witnesses mandates an *Alderman* type hearing.

3. Whether, if §§2518(9) and (10) do not provide the witness with the right to disclosure and an opportunity to seek judicial resolution of the legality of the wiretap, the due process clause of the Fifth Amendment, the Fourth Amendment, article three of the Constitution, prior case law, and/or the supervisory power of this Court require that he be given such right and opportunity.

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[1]No question is presented concerning non-statutory illegal electronic surveillance, on the assumption that if any there was, the Solicitor General will disclose it.
Alderman v. United States, 394 U.S. 165 (1969).

Statutes Involved.

18 U.S.C. §2515.

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, and other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, lgislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. §2518(9).

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

18 U.S.C. §2518(10).

(10) (a) Any aggrieved person in any trial, hearing, oe proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision

thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the gounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Statement.

This case raises the most fundamental Fourth Amendment claims.

Sidney Parnas, a 63-year old accountant, works for Caesar's Palace, a legal, licensed Las Vegas casino. His principal duties are in connection with a travel service and information office at 1435 Broadway, New York, New York, which assists New Yorkers in making reservations for travel to and accommodations in Las Vegas.

Until recently, Mr. Parnas lived undisturbed by local or federal law enforcement agents. In November and December 1970, however, his voice was apparently overheard on a wiretap installed on the home telephone of Jerome Zarowitz, who, undisputedly, was the principal target of the government's massive electronic surveillance, and is a Palm Springs resident who was formerly an executive of Caesar's Palace. Following these intrusions, which were authorized by Hon. A. Andrew Hauk, U.S.D.J., under the provisions of the Omnibus Crime Control Act of 1968, 18 U.S.C. §§2516-19, the Federal Bureau of Investigation obtained a warrant to search Parnas.[2]

Then, early in 1971, Mr. Parnas received a subpoena to testify before a federal grand jury sitting in Los Angeles on February 10, 1971. This grand jury, which had returned indictments involving interstate gambling, was apparently, investigating "hidden interests" in Las Vegas casinos, "skimming" of funds from casinos, and related matters. Adrian Marshall, counsel

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[2]The record below has been certified and will be available to the Court.

for Mr. Parnas, asked attorneys for the United States whether they intended to use material obtained by wiretap in questioning Mr. Parnas before the grand jury. These attorneys replied that they had precisely that intention. Mr. Parnas appeared before the grand jury and read a statement declining to answer questions until his rights to disclosure of wiretap material and to make motions to prevent further intrusion on his right of privacy were respected.

Parnas remained insistent that his rights were being infringed, and the government remained obdurate that he must answer. He was taken before United States District Court Judge Crary to resolve the question. Believing the question to be too serious for immediate resolution, Judge Crary adjourned the appearance for one week to permit briefs to be filed. On February 17, 1971, Judge Crary denied relief and ordered Parnas to answer to be committed for civil contempt.

The facts regarding Mr. Gelbard are quite similar. A telephone tap under 18 U.S.C. §§2516-2518 was conducted of an unknown person, probably an alleged bookmaker. At the time of this tap and the authorization for the interception it is probably that Gelbard's name was unknown to the government and became known only because his conversations were also intercepted in the course of his conversing over the telephone with the person who was the object of the tap. Gelbard's attorney, Burton Marks, refused to permit Gelbard to be sworn before the grand jury.

Messers. Parnas and Gelbard seek to know whether the Omnibus Crime Control Act requires that governmental electronic surveillance be disclosed to its victims before it may be used against them, or whether, if not, the Constitution or compelling reasons of federal supervisory power require the same result. If disclosure is required, petitioners contend that they must be given the opportunity to obtain a prompt, but adequate, hearing on whether (as they claim) the wiretapping was illegal before their privacy may be further compromised by disclosure of its fruits through grand jury interrogation.

REASONS FOR GRANTING THE WRIT.

This case comes to the Court as the Justice Department shows every sign of using the grand jury—meeting in secret, interrogating witnesses without their counsel present, and ranging broadly over many fields of inquiry—as its principal weapon against alleged political criminals and, alleged racketeering. The rights of grand jury witnesses should be settled by this Court at the earliest opportunity, given the free-wheeling summary civil contempt power which district judges have—and are using—under the Organized Crime Control Act of 1970. The present case presents an issue of great importance in the administration of criminal justice, on which the courts of appeals are in disagreement, and, together with other cases here on issues of immunity and testimonial privilege presents an opportunity to bring order to this troublesome and controversial area. Petitioners turn to a consideration of the questions presented.

1. The Court of Appeals for the Ninth Circuit and the Third Circuit Have Disagreed as to Whether a Grand Jury Witness May Challenge the Use Against Him or Her of the Fruits of Illegal Electronic Surveillance, and Is Entitled to a Hearing on This Issue.

A. The Wiretap Law — Setting of This Case.

The Congress, in 1968, authorized wiretapping and electronic surveillance under judicial control for use in the detection and prosection of crimes listed in 18 U.S.C. §2516. The constitutionality of this legislation, 18 U.S.C. §§2516-18, is open to serious question, but is not at issue here. See, however, Schwartz, *The Legitimation of Electronic Eavesdropping*, 67 Mich. L. Rev. 455 (1969); *Lyon, Note, Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968*, 23 Rutgers L. Rev. 319 (1969); *Berger v. New York*, 388 U.S. 41 (1967). Briefly, the statutory scheme provides that application for surveliance orders may be made to a federal judge. The statute authorizes state judicial wiretap orders, but these provisions are irrelevant in this case, as provided in 18 U.S.C. §2518(1). The judge may require the application to be supplemented. 18 U.S.C. §2518(2). If he finds the statutory standards met, the judge may issue an eavesdropping order. §2518(3). The order must name the person whose communications are to be intercepted, must identify the communications facilities to be used, must identify the agency conducting the interception and the person authorizing the application, and must state the period of time for which the interception is

authorized. §2518(4). 18 U.S.C. §2518(5) limits orders under the statute to thirty days. Sec. 2518(6) permits the issuing judge to have reports submitted to him concerning the interception. Sec. 2518(7) authorizes "emergency" interceptions without prior judicial approval. Sec. 2518(8) deals with custody of recordings; it provides that the issuing judge must give notice of the interception to the person against whom the order was issued and may give such notice to all those overheard by the device. Secs. 2518(9) and (10) provide for the rights of those overheard in the course of electronic surveillance under the statute, to disclosure of the fruits of surveillance and to a hearing on legality and taint.

The statute, as the above summary reveals, seeks to insulate wiretapping and bugging from a holding of outright unconstitutionality, and to overcome the constitutional interdiction of *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). Its provision for judicial intercession seeks to satisfy the warrant requirement of the Fourth Amendment; the provisions for limitation of the tap or bug seek to limit the scope of wiretap searches, so that they do not become forbidden "general" or ransack searches. See *Katz, supra; Stanford v. Texas*, 379 U.S. 476 (1965). These protective provisions are not "window-dressing" or sham—they are the essence of the statute, the difference (or so the draftsmen apparently thought) between a constitutional and an unconstitutional wiretap bill. They should, therefore, be given an expansive and not a narrow reading.

So it is, petitioners submit, that §2518(9) and (10) should be read as the Third Circuit read them, and not as did the Ninth Circuit.

B. Analysis of Sections 2518(9) and (10).

The government has admitted that its questioning of petitioner will result in "disclosure" of intercepted communications. Thus, it appears that they are entitled to ten days' notice of the interception, within which time they could move to prevent the disclosure under §2518 (10). The Court of Appeals, however, affirmed that a grand jury was not a "trial, hearing or other proceeding in a Federal . . . court," and that §2518 does not require notice and disclosure.

This is in direct contradiction to the holding of the Court of Appeals for the Third Circuit, sitting *en banc*, in *In re Egan*, 39 U.S.L.W. 2724 (May 28, 1971). There, the Court found that §2518(10)(a) provides relief for any person who is an "aggrieved person" within the meaning of §2510(11) in "any . . . hearing or proceeding . . . before any . . . authority of the United States", 39 U.S.L.W. 2725, and the Court specifically found that a witness before a grand jury is thus protected under §251[illegible] This case is the only other Court of Appeals' decision on this point.

"Proceedings in court" encompasses many ancillary proceedings. See cases collected in *34 Words and Phrases*, pp. 190-91 (heading "Proceeding in Court") (Perm. ed.) and 1970 Pocket Part pp. 25-26.

The statute contains internal evidence that the word "proceeding" includes a grand jury proceeding. Sec. 2517(3) in authorizing disclosure of intercepted communications, speaks of "any *criminal* proceeding" and

of "any . . . *grand jury* proceeding" (emphasis added). And §2515 encompasses "any . . . other proceeding in or before any . . . grant jury." Given the principle that the same word should have the same meaning throughout the statute, it is clear that "proceeding" in §2518 (9), used without qualification, encompasses "criminal proceeding", and "grand jury proceeding", and has as well a reach which need not be specified in order to decide this case. See generally Thorne, *Construction of Statute*, in How to Find the Law, p. 353 (1949). Furthermore, Rule 1 of the Federal Rules of Criminal Procedure defines "criminal proceeding" as inclusive of grand juries. See F.R. Crim. P. 6. Under this reading, while petitioners would not have a *right* to disclosure of the fact of interception under §2518 (8)(d),[a] they acquire this right when the government seeks to use the information to their detriment—a thoroughly logical reading of the statute. See also Point 3, *infra*.

Since petitioners are "aggrieved persons" within the meaning of §2518(10), Rule 41(e), F. R. Crim. P. they would have the right to move in the district court to prevent further invasion of their privacy through use against themselves of the tainted evidence under *Alderman v. United States*, 394 U.S. 165 (1969).

The government, and the court below, apparently rely upon the legislative history of the statute to contradict this reading of its plain language. This novel approach seems to permit reading the statute itself only if the legislative history is vague, is as logically unserviceable as it is legally impermissible. See *Thorne, supra*, at 359.

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[a]Except insofar as the F. R. Cr. P. 41 inventory provisions give him such a right.

The government cited in the court below the following language from S. Rep. No. 1097, 90th Cong., 2d Sess. pp. 105-06, 2 U.S. Code Cong. & Adm. News 2195 (1968):

> " 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing."
>
> * * *
>
> "Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. . . . There is no intent to change this general rule."

The report cites *United States v. Blue*, 384 U.S. 251 (1966), as an indication of what the "general rule" is. *Blue* is cold comfort to the government.

In that case, the taxpayer had filed pleadings in a civil case prior to his criminal indictment. The Court held that if these pleadings constituted compelled self-incrimination, their allegedly-tainted character could be tested by a motion to suppress their use as evidence. The Court said that the use of tainted evidence before a grand jury does not invalidate an indictment. 384 U.S. at 255 n. 3.

Petitioners do not seek to quash or prevent an indictment—all they want is the right to preserve this privacy from further intrusion. Their situation and that of the petitioner in *Blue* bear no relation to one another.

We may assume for purposes of this case that *Blue* is still the law. Petitioners are still entitled to relief.[4]

The legislative history thus misreads the holding in *Blue*. More than this, it fails to take account of the extensive body of case law which permits a grand jury witness judicial review of the propriety of questions put to him, and which imposes limitations upon the conduct of government counsel before grand juries. The following discussion sets out this case law, and makes clear that reliance upon the legislative history is wrong for two reasons: First, to the extent that the legislators evince an overriding intention to codify existing law, that law supports the petitioners' position here. To the extent that the legislators misstate existing law, their legal analysis is not worthy of credence by this Court which is, after all, charged under Article Three with exercising the judicial power and not leaving it to Congress to do so.

The person who claims to be victim of an unlawful search is *always* entitled to obtain disclosure of the extent of the search and a judicial determination of its legality, just as soon as he has grounds to believe that he has been searched. Whether this proceeding is styled a "pre-indictment motion to suppress" or an independent lawsuit in equity, the power of a federal district court is undoubted. See *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 355 (1931); *Austin v. United States*, 297 F. 2d 356 (4th Cir. 1961); *Stern v. Robinson*, 262 F. Supp. 13, 15 (N.D. Tenn. 1966). See also *Perlman v. United States*, 247 U.S. 7 (1918). In the average case, the aggrieved person

[4]Compare *United States v. Arcuri*, 282 F. Supp. 347 (E.D. N.Y.), aff'd, 405 F. 2d 691 (2d. Cir. 1968).

knows the search has been conducted, because tangible objects have been taken after a visible and announced intrusion. The victim of wiretapping, however, rarely enjoys such notice, and §2518(9) merely puts him on a par with the victims of other searches. The right to suppression of evidence, and prevention of its use, exists unrelated to the question whether, as the legislative history would have it, any "person" is a "party to a grand jury proceeding". See Point 3, *infra*. This right to prevent the use of unconstitutionally-obtained evidence is merely a corollary to the right of privacy itself, which the Fourth Amendment, among others, protects. See *Austin v. United States, supra.*

With specific reference, however, to grant jury proceedings, witnesses can and often do litigate the propriety of compelling their testimony concerning certain subjects. Much of this litigation deals with the invocation of evidentiary privileges, designed to protect private communications. The doctor-patient, clergyman-penitent, husband-wife, and psychotherapist-patient privileges are among those which the law recognizes and which a witness may interpose. Basically, the witness in such a position seeks to defend his right of privacy, or the right of privacy of someone in a confidential relationship with him, against governmental intrusion. Closer to our case, a district judge for the Northern District of California has restrained governmental intrusion into private communications to a newspaper reporter, relying heavily upon the First Amendment guarantee of freedom of the press and the rights

of privacy which must necessarily attend such a guarantee. *In re Caldwell*, 311 F. Supp. 358 (N.D. Calif. 1970), 39 U.S.L.W. 2281 (9th Cir. 1970), *cert. granted*, O. T. 1970, No. 1114 (May 4, 1971).[5]

The Fifth and Sixth Amendment guarantees of freedom from compulsory self-incrimination and right to counsel have been enforced on behalf of a grand jury witness. *Sheridan v. Garrison*, 273 F. Supp. 673 (E.D. La. 1967); *Chandler v. Garrison*, 286 F. Supp. 191 (E.D.La. 1968). See also *In re Grand Jury Subpoenas*, 225 F. Supp. 923 (N.D. Ill. 1964) (taking jurisdiction of motion to quash but denying relief).

Thus, far from being unusual that a witness should seek to challenge the propriety of his subpoena, and of the governmental conduct which will flow from it, the case-law demonstrates that those in petitioners' position have customarily been permitted to do just that. See *In re Egan, supra.*

There are, of course, strong reasons of policy and prudence for construing the statute as it literally reads. Petitioners are the typical, rather than the atypical, victim of 1968 Crime Bill surveillance. *Their* telephones were not tapped. No agent of the Federal Bureau of Investigation ever made a showing of probable cause to invade *their* privacy. They are the accidental victims of a search begun against others. No judicial officer has ever given petitioners' privacy a moment's

[5]A witness subpoenaed before a Congressional Committee can bring an anticipatory challenge to the committee and to its right to invade his right of privacy. *Stamler v. Willis*, 371 F. 2d 413 (7th Cir. 1966).

reflection until the applications which give rise to the appeal. Before the invasion of privacy goes further, through disclosure of that which was overhead, Petitioners should be given some few minutes of judicial time. Once the disclosure is made, there is no real redress. A bell cannot be "un-rung". Privacy once compromised, cannot be restored. *In re Egan, supra,* the "pretrial" motion prospect not only does not provide complete redress: If petitioners are never indicted, it provides no opportunity at all to challenge governmental illegality.

More than prudence, however, counsels the reading of the statute which petitioners urge. As argued below, the constitution may well require that a victim of electronic surveillance be given a change to litigate the legality of the search before its fruits are used against him. Whether the Court concurs in that argument or not, clearly the constitutional argument has merit. More than once this Court has construed legislation so as to avoid constitutional doubts, *e.g., United States v. Rumely,* 345 U.S. 41, 47 (1948); *United States v. Seeger,* 380 U.S. 165, 188 (1965) (Douglas, J., concurring), or in harmony with constitutional policy, *e.g., United States v. Johnson,* 323 U.S. 273, 274-76 (1944) (Frankfurter, J., for the Court).

C. Concluding Observations on Section 2518.

The witness before a grand jury is an anomaly in our law. Without his counsel, in secret, and subject to searching and hostile inquistion at the hands of a trained interrogator, he must do the best he can, with

a little help from a lawyer in the anteroom, to defend his rights. That he should be deprived of judicial review of proposed violations of his statutory and constitutional rights in the interrogation process is a novel and iniquitous notion. To permit this violation in the face of plain statutory language which inderdicts is unheard of.

2. 18 U.S.C. §2515 Requires That a Hearing Be Held to Determine Whether the Information Upon Which the Grand Jury Questions the Witness Was Derived From Unconstitutional Electronic Surveillance.

Section 2515 provides in part:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter."

The meaning of this section is so clear that any lengthy embellishments would only serve to obfuscate it; it unequivocally prohibits the use of evidentiary fruits of illegal electronic surveillance before a grand jury. A simple syllogistic reading of this language, therefore, mandates an *Alderman*-type hearing before a District Court judge to determine under §2518(10)(a) whether the electronic surveillance was, in fact, constitutional.

This reasoning is the keystone in the Court's opinion in *In re Egan, supra,* where a remand to the District Court for such a hearing was ordered.

3. The Fourth and Fifth Amendments. This Court's Supervisory Power Over Criminal Justice and Prior Case Law Require Disclosure of Overheard Conversations to a Grand Jury Witness. In the Alternative, Disclosure Must Be Made to a Grand Jury Witness Who Gives Notice of a Good Faith, Non-Frivolous Ground of Objection to the Use Against Him of the Tainted Evidence.

Although the wiretap which is at issue here was not designed to overhear petitioners, the Federal Bureau of Investigation has claimed, for example, that Parnas was overheard in conversations with Zarowitz which establish probable cause to believe that these two and others are involved in interstate gambling in violation of 18 U.S.C. §1952, in "skimming" funds from Ceasar's Palace (a Las Vegas casino) into the underworld in apparent possible violation of various income tax and anti-racketeering laws, and in the operation of Caesar's Palace as an interstate business in violation of Nevada and federal law. The FBI's exuberant allegations, made in an affidavit to get a search warrant, give petitioners reason to believe that they are not being asked before the grand jury merely to help ensnare others.

Under these circumstances, they are entitled, like any other persons aggrieved by an assertedly illegal search, to move to suppress the fruits of that search and have them returned to him. See cases cited in Part I, *supra*, including *Go-Bart Importing Co. v. United States, supra; Austin v. United States, supra.* This would be theirs whether or not they were subpoenaed witnesses.

The government apparently does not dispute that petitioners are entitled to *some* judicial review of the allegedly illegal interception of their conversations, and that they could move under F.R. Crim. P. 41(e), by

independent suit in equity, or by an action under 18 U.S.C. §2520. The statutory remedies of suppression under §2518(10) and suit for damages under §2520 are not exclusive, so as to preclude other lawsuits under the more general federal question jurisdictional provisions such as 28 U.S.C. §§1331, 1343, and 1361.[6]

The government could not well dispute petitioners' rights to full judicial redress of claimed violations of constitutional right, or claim that §2518 limits judicial review. When the Congress wishes to limit the availability of review, it does so in terms insusceptible of misunderstanding. See, *e.g.*, 50 U.S.C. App. 460(b)(3). And even then, this Court has interpreted such provisions so as to preserve as much as the statutory language will permit of the general federal judicial power to inquire into claimed violations of federal right. See, *e.g.*, *Oestereich v. Selective Service System*, 393 U.S. 233 (1968); *Breen v. Selective Service Board*, 396 U.S. 460 (1970). Serious constitutional questions are involved in any restriction on judicial review of constitutional violations. See, *e.g.*, *Blount v. Rizzi*, 39 U.S.L.W. 4120 (1971).

The importance of judicial intervention into wiretap matters was underscored by this Court in *Alderman v. United States*, 394 U.S. 165 (1969), in which the Court also dealt with the right of the victim of surveillance to notice that he has been surveilled. And while *Alderman* gives the *logs* of surveillance only to the victim of unlawful interception, notice of the *fact* of interception and a judicial determination of legality

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[6]A court has extensive ancillary jurisdiction even in criminal matters. *Morrow v. District of Columbia*, 417 F. 2d 628 (D.C. Cir. 1969).

are clearly envisioned not only in *Alderman* but in *Giordano v. United States*, 394 U.S. 310 (1969) and *Taglianetti v. United States*, 394 U.S. 316 (1969). *Alderman*, *Giordano* and *Taglianetti* immeasurably strengthen petitioners' position.

The government's contention is not, therefore, that Parnas and Gelbard are not entitled to review; rather, that they are not entitled to *notice* of the invasion of privacy, and not entitled to litigate the legality of the invasion prior to having, under penalty of jail, to answer questions fashioned from the materials obtained in the invasion. This contention overlooks the basic principle that the due process clause guarantees a hearing that is not only procedurally fair but timely:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' [Citation omitted.] The hearing must be 'at a meaningful time and in a meaningful manner.' [Citation omitted.] In the present context these principles require that a recipent have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg v. Kelly*, 397 U.S. 254, 39 U.S.L.W. 4223, 4226 (1970).

Goldberg deals with the right of a welfare recipient to a pre-termination hearing concerning her or his welfare benefits—a grant of governmental largesse which however necessary to survival has never been regarded as a constitutional right. Here we deal with a constitutional right of first importance—the right of privacy of confidential communications, protected by the first, fourth, fifth, and perhaps the ninth, amendments. See

Griswold v. Connecticut, 381 U.S. 479 (1965); *Frank v. Maryland*, 359 U.S. 360 (1959); *Marcus v. Search Warrant*, 367 U.S. 717 (1961). The timeliness of a hearing is as important an issue here as in *Goldberg*. Indeed, since we deal with a constitutional right of the first magnitude, there is strong authority that the intercession must not only be timely but must be in a judicial proceeding. See *Blount v. Rizzi*, 39 U.S.L.W. 4120 (1971), and particularly the citation with approval in fn. 5 of the Court's opinion of *Manual Enterprises v. Day*, 370 U.S. 478, 518-19 (1962) (concurring opinion of Brennan, J.).

More than interests in privacy and speech are at stake here. If petitioners do not answer questions put to them before the grand jury, they will go to jail. The government and the court below would send them there without any judicial inquiry whatever into the legality of the government's conduct in calling them as a witness and asking them questions fashioned from the intrusion into their privacy. This is not a case like *Blue*, in which complete relief could be granted a civil plaintiff in a pending criminal action. Petitioners' liberty is in jeopardy. As Learned Hand observed:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens." *United States v. Coplon*, 185 F. 2d 629, 638 (2d Cir. 1950).

This case raises, because of the imminent threat of jail, questions deeper than *Goldberg v. Kelly*. Neither the Congress nor the federal courts may fashion a rule which deprives a citizen of all opportunity for judicial review before committing him to jail. See generally Hart

& Wechsler, *The Federal Courts and the Federal System*, 312-340, and particularly p. 340:

> "Jurisdiction always is jurisdiction only to decide constitutionally."

The meaning of this cryptic phrase from two eminent scholars in the field of judicial review is starkly clear in this case: The district judge cannot exercise jurisdiction to commit Sidney Parnas and David Gelbard to jail and at the same moment cut off their right to litigate questions of constitutional right on which the commitment inescapably depends. The cases and authorities cited by Hart and Wechsler establish this proposition. See also Tigar, *Judicial Review, the "Political Question Doctrine, and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135, 1173-79 (1970).

The importance of judicial review is the more evident because, as noted above, petitioners have never had a judicial determination that their privacy should be invaded by a telephone tap. Such a determination was made only with respect to Zarowitz.

Too, we do not deal here with tangible property which can be given back or its equivalent given in damages. Privacy once gone cannot be recaptured, and complete relief requires a hearing and notice of the type petitioners have urged.

In the alternative, a narrower holding may give all the relief they seek. Parnas and Gelbard are no ordinary grand jury witnesses. They are evident targets of a criminal investigation, armed with the knowledge that they have been overheard on a wiretap far surpassing in breadth the narrow little eavesdrop in *Katz v. United States, supra*, making a good-faith, non-frivolous attack on the legality of that wiretap, and about to go to jail for refusal to answer. Thus, a holding which said

that one in such a position might litigate prior to his grand jury appearance would present little, if any, difficulty for the government. Requirements of "good faith" and "nonfrivolous" contentions abound in the law. *E.g.*, 28 U.S.C. 1826(b). Giving special consideration to a witness-target is also not novel. See, *e.g.*, *United States v. DiGrazio*, 213 F. Supp. 232 (N.D. Ill. 1963); *Jones and Short, v. United States*, 342 F. 2d 863 (D.C. Cir. 1964); *Sheridan v. Garrison, supra; Chandler v. Garrison, supra.*

Of course, there is little if any inconvenience to the government posed by a requirement that all witnesses be given the notice and hearing which petitioners request. The issue will generally not be whether the government's evidence is tainted, but whether its conduct was legal. This determination can be made based on the application for the wiretap order and a minimum of oral testimony concerning it. Thus, there is no occasion for litigious interruption of the grand jury process, a consideration which the court may well consider in fashioning an appropriate judicial response to this problem. See concurring opinions of Harlan, J., in *Oestereich v. Selective Service System*, 393 U.S. 233 (1968); *Breen v. Selective Service Board*, 396 U.S. 460 (1970). See also *National Students Ass'n v. Hershey*, 412 F. 2d 1103 (D.C. Cir. 1969).

Conclusion.

For the foregoing reasons, the writ should issue.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Plaintiff-Appellee, v. David Gelbard, Defendant-Appellant. No. 71-1263.

United States of America, Plaintiff-Appellee, v. Sidney Parnas, Defendant-Appellant. No. 71-1264.

Filed: June 8, 1971.

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, CARTER and TRASK, Circuit Judges.

PER CURIAM.

These consolidated appeals involve persons who proved recalcitrant when they appeared as witnesses before a federal grand jury and who were each committed to custody pursuant to 28 U.S.C. § 1826(a), after being adjudged guilty of civil contempt. In order to meet the rigorous statutory time limit imposed by 28 U.S.C. § 1826(b) it was necessary to, and this court did, immediately following oral argument, render decision. We affirmed the judgment of the court below and stated an opinion would follow. This is that opinion.

Both Gelbard, the appellant in No. 71-1263, and Parnas, the appellant in No. 71-1264, refused to answer any questions based upon information gained by the government from wiretapping authorized by the district court pursuant to 18 U.S.C. § 2518, which is a part of Title III of the Omnibus Criminal Control Act

and Safe Streets Act of 1968, Pub. L. 90-351, June 19, 1968, 82 Stat. 218. When cited for contempt in the district court, each attacked the constitutional validity of Section 2518, and additionally urged that he should not be required to testify until and unless first allowed to inspect all applications, orders, tapes and transcripts relating to such electronic surveillance and afforded an opportunity to suppress the use before the grand jury of any evidence so secured. The court rejected their contentions and held the statute valid.

We find it unnecessary to consider the district court's finding that Section 2518 is constitutionally valid. A witness before a grand jury lacks standing to challenge a statute on constitutional grounds unless the statute directly bears upon his privilege against self-incrimination. *Carter v. United States,* 417 F.2d 384, 386-7 (9th Cir. 1969), *cert. denied,* 399 U.S. 935 (1970). Section 2518 is not in that category.

It appears to be settled that a witness in a grand jury proceeding has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used in such a proceeding. See *Cobbledick v. United States,* 309 U.S. 323 (1940); *Costello v. United States,* 350 U.S. 359 (1956) and *Lawn v. United States,* 355 U.S. 339 (1958). Finally, we agree with the Fifth Circuit's decision in *Dudley v. United States,* 427 F.2d 1140, 1141 (5th Cir. 1970) "that nothing in the Omnibus Act, particularly § 2518(10)(a) created a statutory exception which would

permit a pre-indictment motion to suppress evidence that might be presented to the grand jury. . . . The legislative history of the Act supports this conclusion. See Senate Report No. 1097, 90th Cong. 2d Sess. (1968) at p. 2195."[1]

---

[1]The report contains this statement:

"Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (Blue v. United States, 384 U.S. 251 (1965)). There is no intent to change the general rule."

Neither does 18 U.S.C. § 2518(9) support appellants in their contention that as witnesses they were entitled to copies of the applications and orders for the interceptions, together with transcripts, tapes, etc.

The language of paragraph (9) does not so indicate and the Legislative Report shows that paragraph (9) must be read in pari materia with paragraph (10). Thus, paragraph (9) is intended to enable a party charged with a criminal offense or facing other adversary proceeding to secure copies of the application for and the order permitting the interception to enable him to move to suppress evidence so gathered; but it does not extend to grand jury proceedings. As the Report states: " 'Proceeding' is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. It would not include a grand jury hearing." Id. p. 2195.

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No. 71-110

In the Supreme Court of the United States

OCTOBER TERM, 1971

DAVID GELBARD AND SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-110

DAVID GELBARD AND SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner Parnas was summoned to appear on February 10, 1971, before a federal grand jury convened in the Central District of California. Prior to appearing, he became aware that certain conversations of his had been overheard during an electronic surveillance of the telephones of one Jerome Zarowitz. He then sought an order from the district court that he be furnished with all applications, orders, tapes and transcripts relating to the surveillance, which he claims he is entitled to under the wiretap provisions of the Omnibus Crime Control Act; and that his appearance before the grand jury be delayed until he could move to suppress any conversations of his that

442-301—71

were overheard. At a hearing on these motions, it was disclosed that petitioner had been overheard during a court-authorized interception pursuant to 18 U.S.C. 2518(3) directed against Zarowitz. Counsel stated that the government intended to use the transcripts of the Zarowitz interceptions to refresh the witness's memory, if necessary.

On February 17, 1971, the district court denied petitioner's motions and ordered him to appear before the grand jury and testify, ruling that the motions were inappropriate in a grand jury context. Parnas subsequently appeared before the grand jury, but refused to answer questions concerning his occupation, his acquaintance with Zarowitz and one John Baborian, his knowledge of Zarowitz's ownership of Caesar's Palace in Las Vegas, Nevada, his activities as middleman for Zarowitz and Baborian in financial transactions, and his knowledge of Baborian's residence, on the ground that he was entitled before responding to challenge the validity of the means by which the information on which these questions were based was gathered. The district court ordered Parnas to answer the grand jury's questions, Parnas again refused, and the court adjudged him guilty of civil contempt and committed him to custody until he obeyed its order or the grand jury term expired.

The facts as to petitioner Gelbard are substantially the same. The district court overruled his motion for disclosure and, when he also refused its order to answer the grand jury's questions (concerning his occupation, his acquaintance with one Perry Paul and one Jerry Kilgore, his knowledge of Kilgore's business

activities, wagers placed on behalf of Kilgore and one Frank Rosenthal, and wagers placed with one Sam Farkas or one Anton Kaleel), the court adjudged him guilty of civil contempt and committed him to custody.

The court of appeals affirmed as to both petitioners (Pet. App.). It held that a witness before a grand jury "has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used" before the grand jury (Pet. App. 2), and concluded that the Omnibus Crime Control Act did not give the witness such a right.

On the basic issue whether a witness before a grand jury may refuse to answer questions on the ground that they are the product of illegal electronic overhearing of his own voice, the opinion below conflicts with the decisions of the courts of appeals for the District of Columbia Circuit in *In re Evans,* decided July 23, 1971, and for the Third Circuit in *In re Egan,* decided May 28, 1971, and *In re Walsh,* decided June 22, 1971. The government has filed petitions for writs of certiorari in those cases, *United States* v. *Evans, United States* v. *Fishlowitz,* filed August 20, 1971, No. 71-256; *United States* v. *Egan, United States* v. *Walsh,* filed August 20, 1971, No. 71-263. In the present case, the issue arises in a somewhat different context, since the government disclosed to each petitioner that he had been overheard during court-authorized wiretaps, and thus the precise issue is whether a grand jury witness may challenge the validity of an acknowledged wiretap before answering the grand jury's questions. While we think that the

court below correctly decided this case,[1] we suggest that the Court grant this petition and hear the case together with Nos. 71–256 and 71–263.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

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[1] In our view, a witness before a grand jury is not a "party" and a grand jury investigation not a "trial, hearing or proceeding" under 18 U.S.C. 2518(10), so that a grand jury witness is not entitled to litigate the validity of the court-authorized wiretap before answering the grand jury's questions. The legislative history of Section 2518 supports this interpretation, as the court below noted (Pet. App. 3, n. 1).

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IN THE

Supreme Court of the United States

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No. 71-110.

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-110

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Opinion Below.

The opinion of the Court of Appeals is reported at 443 F. 2d 837 (9th Cir. 1971).

Jurisdiction.

The Court of Appeals rendered its opinion and judgment on June 8, 1971. A timely petition for rehearing was filed, and rehearing was denied on June 23, 1971. The Petition for Certiorari was filed on July 22, 1971, and certiorari was granted December 13, 1971. This Court has jurisdiction under 28 U.S.C. §1254(1).

Constitutional Provisions and Statutes Relied Upon.

The following provisions, being lengthy, are set out in an appendix to this brief.

U.S. Constitution, Amendment 4;
U.S. Constitution, Amendment 5, due process clause;
18 U.S.C. §1826(a);
18 U.S.C. §§2510-20;
18 U.S.C. §3331(a);
Federal Rule of Criminal Procedure 41(e).

Questions Presented.

1. Whether a grand jury witness, summoned to testify under compulsion, is entitled to notice of wiretapping having been conducted against him and a hearing on his claim that the questions put to him will be based on illegally-overheard conversations which he has standing to suppress, and whether such hearing must as a matter of due process of law be afforded before he is committed to jail for civil contempt for refusing to answer the grand jury's questions.

2. Whether, if the Constitution does not afford the right mentioned in Question One, the right is provided by:

(a) 18 U.S.C. §2515, which prohibits the use before a grand jury of illegally-obtained wiretap and other electronic surveillance evidence; and/or

(b) 18 U.S.C. §§2518(9) and (10), which provide for notice and hearing in certain situations for a victim of electronic surveillance.

3. Whether, if there is a right of the kind mentioned in Questions One and Two, a full adversary hearing should be held to enforce it.

Statement of the Case.

Sidney Parnas, a 63-year old accountant, works for Caesar's Palace, a legal, licensed Las Vegas casino. His principal duties are in connection with a travel service and information office at 1435 Broadway, New York, New York, which assists New Yorkers in making reservations for travel to and accommodations in Las Vegas.

Until recently, Mr. Parnas lived undisturbed by local or federal law enforcement agents. In November and December 1970, however, his voice was apparently overheard on a wiretap installed on the home telephone of Jerome Zarowitz, who, undisputedly, was the principal target of the government's massive electronic surveillance, and is a Palm Springs resident who was formerly an executive of Caesar's Palace. Following these intrusions, which were authorized by Hon. A. Andrew Hauk, U.S.D.J., under the provisions of the Omnibus Crime Control Act of 1968, 18 U.S.C. §§2516-19, the Federal Bureau of Investigation obtained a warrant to search Parnas.

Then, early in 1971, Mr. Parnas received a subpoena to testify before a federal grand jury sitting in Los Angeles on February 10, 1971. This grand jury, which had returned indictments involving interstate gambling, was apparently, investigating "hidden interests" in Las Vegas casinos, "skimming" of funds from casinos, and related matters. Adrian Marshall, counsel for Mr. Parnas, asked attorneys for the United States whether they intended to use material obtained by wiretap in questioning Mr. Parnas before the grand jury. These attorneys replied that they had precisely that intention. Mr. Parnas appeared before the grand jury

and read a statement declining to answer questions until his rights to disclosure of wiretap material and to make motions to prevent further intrusion on his right of privacy were respected.

Parnas remained insistent that his rights were being infringed, and the government remained obdurate that he must answer. He was taken before United States District Court Judge Crary to resolve the question. Believing the question to be too serious for immediate resolution, Judge Crary adjourned the appearance for one week to permit briefs to be filed. On February 17, 1971, Judge Crary denied relief and ordered Parnas to answer or be committed for civil contempt.

The facts regarding Mr. Gelbard are quite similar. A telephone tap under 18 U.S.C. §§2516-2518 was conducted of an unknown person, probably an alleged bookmaker. At the time of this tap and the authorization for the interception it is probably that Gelbard's name was unknown to the government and became known only because his conversations were also intercepted in the course of his conversing over the telephone with the person who was the object of the tap. Gelbard's attorney, Burton Marks, refused to permit Gelbard to be sworn before the grand jury.

Summary of Argument.

Petitioners first point is quite simple: They argue that a grand jury witness may properly refuse to answer questions which are the product of unlawful electronic surveillance. They submit that a grand jury witness with a fourth amendment claim has the same right to enforce his claim through testimonial silence as any witness with a self-incrimination privilege, husband-wife privilege, or similar claim. Petitioners concede that the

mere making of a claim does not establish it. They say only that when the claim is made, the witness should be given a chance to establish it as a defense to a summary civil contempt proceeding, and if it is established, relieved from the obligation to testify in answer to questions which are the tainted fruit of illegality. This argument rests upon the notion that the formidable powers of testimonial compulsion and of summary civil contempt must be hedged about with safeguards to ensure they are not used to commit or compound invasion of privacy. The principle that there must be judicial review of every claim of testimonial privilege will be seen to have been violated in the case of petitioners.

Alternatively, petitioners argue that irrespective of any constitutional protection of the privacy and liberty, 18 U.S.C. §§2515, 2518(9) and (10) forbid the government to use the tainted fruits of illegal tapping before the grand jury, and require that petitioners be given notice of the use of tapping conducted against them and a hearing at which they could show that the government intended to use illegal material.

In the final portions of this brief, petitioners show that the hearing they seek will not endanger legitimate governmental interests, and discuss the context in which this case is being heard.

ARGUMENT.

I.

THE DUE PROCESS CLAUSE AND ARTICLE THREE OF THE FEDERAL CONSTITUTION, AND 18 U.S.C. SECTION 1826, REQUIRE THAT PARNAS AND GELBARD BE GIVEN A HEARING BEFORE BEING JAILED FOR REFUSAL TO ANSWER QUESTIONS WHICH ARE BASED UPON, AND WILL ELICIT ANSWERS COMPOUNDING, UNCONSTITUTIONAL AND UNLAWFUL INVASIONS OF THEIR PRIVACY.

A. Introduction.

Petitioners argue in this section that irrespective of any provisions of the "wiretap law", 18 U.S.C. §§2510-20, they are entitled to a hearing on their fourth amendment and statutory claim before being taken off to jail for refusals to answer which were expressly based on their fourth amendment and statutory rights.[1] This contention rests upon both statutory and constitutional premises.

B. The Statutory and "Inherent Power" Bases of Civil Contempt and of Testimonial Compulsion Before Grand Juries.

Parnas and Gelbard were ordered committed under 18 U.S.C. §1826, a part of the Organized Crime Control Act of 1970, P.L. 91-452. This section provides in part:

> "Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or

[1]Since there has been no hearing of the kind sought, the court must assume there has been illegal tapping. *Alderman v. United States*, 394 U.S. 165 (1969).

> provide other information . . . . the court, upon such refusal, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony . . ."

The section goes on to provide that the confinement may last until the court proceeding is over or until the grand jury's term is up, but not for more than eighteen months. Section 1826(b) deals with bail and with judicial review of the commitment order.

Turning to 18 U.S.C. §3331(a), we discover that a grand jury convened under that Section may sit for eighteen months, and with extensions granted by the court, for a term of three years. Section 3333(e) permits a grand jury to sit even longer. And of course there is nothing to prevent one grand jury being dissolved and another promptly begun to deal with the same subject, since a district judge must summon a special grand jury if the Attorney General "certifies in writing" that it is necessary. §3333(a).[2]

Thus, although §1826 limits confinement to eighteen months for any one refusal, the government is aware of its power to summon a witness before successive grand juries dealing with the same subject matter and prolong the term of confinement. We do not concede the legality of such tactics, but only note that within counsel's experience they have been used.

The Congress has therefore enacted a closely-connected group of statutes which provide that eighteen

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[2]The grand jury before which Parnas was summoned was apparently not convened under this new authority, having been called before the effective date of the 1970 Crime Control Act. Thus, it could not sit for more than eighteen months. There would be nothing to prevent a new grand jury being convened promptly once the eighteen months were up, however.

months and more in jail may be summarily accorded a recalcitrant witness. This Court must decide, in this case, how that fearsome power of summary confinement is to be exercised. In doing so, we respectfully point out that even the federal conspiracy laws provide only a five-year maximum sentence, 18 U.S.C. §371, with time off for good behavior and labor, and an opportunity for parole after one-third of the sentence. Further, a punitive confinement in excess of six months requires a jury trial, though the offense be called "contempt." *Bloom v. Illinois*, 391 U.S. 194 (1968). So here is a weapon, committed largely to the Attorney General's discretion, which reason tells us and experience demonstrates is susceptible of the most sweeping use in the service of any motive that can be cloaked in the name "investigation of organized crime." It is this power that brings accountants and revolutionaries, nuns and gamblers, organizers and poets, together to the bar of this Court.

Turning back to §1826, the legislative history states the basis of the section, which

> "becomes applicable to any proceeding before or ancillary to any court or grand jury in which a witness unjustifiably refuses to testify or to produce other information. . . .
>
> The court is authorized summarily to confine the witness at a suitable place until the witness is willing to give such testimony or provide such information. The procedure is designed to codify present practice. . . . The confinement is civil, not criminal; its purpose is to secure the testimony through a sanction, not to punish the witness by imprisonment. As amended by the committee con-

> finement is, therefore, limited to . . . the term (including extensions) of the grand jury."
>
> 1970 U.S. Code Cong. and Ad. News 4022.

The statutory provision for civil contempt thus changes existing practice only in specifying a maximum term for confinement. There is nothing novel in the use of civil contempt powers to compel testimony, among the many uses of this device to force obedience to judicial command:

> "There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt."

Shillitani v. United States, 386 U.S. 364, 370 (1966). And see *R. Goldfarb, Contempt* 49-67 (1963), for a discussion of the origin of "civil contempt" (or "quasi-contempt", as it was known at common law) as an attribute of judicial power.

Sec. 1826 echoes other, similar provisions dealing with judicial compulsion of testimony and documents:

> "The Act gives the (Securities and Exchange) Commission authority to require the production of books and records in the course of its investigations and in the absence of a basis for saying that its demand exceeds lawful limits, it is entitled to the aid of the court in obtaining them. . . ."
>
> *Penfield Co. of California v. SEC,* 330 U.S. 585, 590-91 (1947).

The Crime Control Act therefore contains no novelties of substance, save a clear intention to use this power of summary "civil" confinement to the uttermost extent permitted in logic and law.

We must, therefore, ask what limits the doctrine has.

C. Limits on Summary Civil Contempt: Why Parnas and Gelbard Were Treated Illegally and Unconstitutionally.

The most important limit suggested by the statute and by decisions of this Court is that the order disobeyed must be lawful. The cases and statutes cited above express this requirement in different ways:

> 18 U.S.C. §1826: "refuses without just cause shown."
>
> Legislative history: "witness unjustifiably refuses to testify."
>
> *Shillitani, supra*: "compliance with their lawful orders."
>
> *Penfield, supra*: "in the absence of a basis for saying that its demand exceeds lawful limits."

Here is the simple heart of the matter: Parnas and Gelbard are not seeking in this proceeding to halt an entire grand jury investigation, and this case could ultimately be decided favorably to them without ordering any evidence suppressed. (Compare our argument under Point II, *infra*.) They merely want the court below to recognize a basis for their refusing to testify about certain subjects, and to free them from a condemnation to jail for that refusal.

There is nothing new in a witness refusing to testify before an investigatory body on the basis of a constitutional, statutory or decisional law privilege or immunity. Grand jury investigations are regularly halted while the court rules upon some such claim: privilege against self-incrimination, husband-wife privilege, lawyer-client privilege, first amendment objections to the breadth of inquiry,[3] and so on. For example, if a wit-

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[3]See *Caldwell v. United States*, 434 F. 2d 1081 (9th Cir. 1970), *cert. granted*, No. 70-57, 39 U.S.L.W. 3388 (3/8/71).

ness responds to a grand jury question by invoking the privilege against self-incrimination, one of two things happens. Either the claim is accepted and the question dropped, or the witness is taken before a district judge to have the claim of privilege ruled upon. The judge tells the witness whether the claim is sustained or whether the witness must, upon pain of summary confinement, answer the question. Parnas and Gelbard refused to answer questions, but based upon the fourth amendment and a federal statute. They were taken before a judge, but he decided not to pay any attention to their fourth amendment claims. Instead, they were ordered off to jail without any judicial decision on the validity of their claim that the question asked, and the answer sought, invaded rights just as precious as those enshrined in the fifth amendment.

Parnas and Gelbard should have the right, we submit, to litigate their claim that the questions posed to them are based upon evidence obtained in flagrant disregard of the fourth amendment and 18 U.S.C. §§ 2510-20, and their corollary claim that answers to these questions would compound the invasion of their privacy.

Chief Justice Warren expressed our view in *Watkins v. United States*, 354 U.S. 178, 187-88 (1957), speaking not only of Congressional investigations but of all governmental inquisitions in which testimony is compelled:

> "It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of Congress and its committees, and to testify fully with re-

spect to matters within the province of proper investigation.

This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress just as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subject to unreasonable search and seizure. . . ." (Emphasis added.)

Before developing this theme, we believe it important to underscore the constitutional limitations upon the power of summary commitment, to give point to petitioners' demand for judicial review.

1. The Constitution Requires Judicial Review of the Basis of Confinement.

Justice Harlan did not speak without basis in seeing "serious constitutional problems" in depriving a person of liberty before he or she had the opportunity to present his or her claims to "any competent forum."

Oestereich v. Selective Service System, 393 U.S. 233, 241, 243 (1968);

Breen v. Selective Service Board, 396 U.S. 460, 468-69 (1970).

In the selective service field, this Court has confronted the problem of judicial review again and again. The draft cases are relevant, for the government seeks to console Parnas and Gelbard as they are marched off to jail with words like those in *Estep v. United States*, 327 U.S. 114, 119 (1946):

"Congess enlisted the aid of the federal courts only for enforcement purposes."

That is, Parnas and Gelbard can have some judicial review, sometime, of their constitutional claim, but first must suffer a denial of liberty for some indefinite period. *Estep* contains a clear answer to this claim. Citing *Ng Fung Ho v. White*, 259 U.S. 276 (1922), the Court said that any attempt to deprive a person of liberty without judicial review of his claims that his rights have been violated would raise grave constitutional doubts. 327 U.S. at 120.[4] And any statute which was silent as to judicial review while prescribing loss of liberty should be construed, if possible, to permit review.

This is no new principle. For every official wrong there should be a remedy. *Marbury v. Madison*, 5 U.S. 137, 163, 166 (1803). The Congress cannot give jurisdiction to a federal court over a case or controversy and then prescribe that the government shall always win. *United States v. Klein*, 13 Wall. 128 (U.S. 1872). If nothing else does so, the habeas corpus provisions of the Constitution give "adequate security that every one who without legal justification is placed in confinement shall be able to get free." Dicey, *Law of The Constitution* 213 (9th ed.). See also J. Story, *Commentaries on the Constitution*, §§1338-42; *In re Merryman*, 17 Fed. Cas. 144, 150 (Fed. Cas. No. 9487) (Taney, J. 1861).

Professors Hart and Wechsler, citing *Estep*, *supra*, and *Ng Fung Ho*, *supra*, conclude it to be a fundamental principle of the constitutional compact that:

> "Jurisdiction always is jurisdiction only to decide constitutionally."

[4] Where Congress invokes the aid of the federal courts to punish contemnors, the courts will insist upon compliance with constitutional standards. *Watkins*, *supra*, at 206-08. Even where

(This footnote is continued on next page)

And following the habeas corpus analogy, they say

> "That principle still forbids a federal court with jurisdiction in habeas corpus from ever accepting as an adequate return to the writ the mere statement that what has been done is authorized by Act of Congress."

H. Hart and H. Wechsler, *The Federal Courts & the Federal System* 334, 340 (1953). See also Tigar, *Judicial Review, the "Political Question" Doctrine, and Foreign Relations,* 17 U.C.L.A. L. Rev. 1135 (1970).

The notion that judicial review of claimed violations of right must precede deprival of liberty is underscored in a number of other cases decided by this Court.[5] The majority opinions in *Oestereich, supra,* and *Breen, supra,* stretch a statute limiting judicial review to avoid constitutional difficulty. 50 U.S.C. App. §460(b)(3). The majority opinion in *Gutknecht v. United States,* 396 U.S. 295 (1970), suggests a concern that summary procedures for ending liberty have a hard time squaring with the Constitution. *Goldberg v. Kelly,* 397 U.S. 254, 267 (1970), clearly holds:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' (Citation omitted.) The hearing must be 'at a meaningful time and in a meaningful manner.' "

And where constitutional rights are at stake, limitation of judicial review is doubly to be condemned. *Cf. Blount v. Rizzi,* 400 U.S. 410 (1971), and particularly the citation with approval, in footnote 5, of

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the Congress acts itself to punish contempt, the alleged contemnor will have judicial review by habeas corpus.

Kilbourn v. Thompson, 103 U.S. 168 (1881).

[5]The right of review is raised in such venerable cases as *Boske v. Comingore,* 177 U.S. 459 (1900). See also *Fay v. Noia,* 372 U.S. 391 (1963).

Manual Enterprises v. Day, 370 U.S. 478, 518-19 (1962) (concurring opinion of Brennan, J.), See also *Freedman v. Maryland*, 380 U.S. 51 (1965). As Learned Hand said:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens."
>
> *United States v. Coplon*, 185 F. 2d 629, 638 (2d Cir. 1950).

In sum, whether it be called due process of law, the command of Article Three of the Constitution, or a logical extension of the habeas corpus concept dating from the reign of Charles II, there is an affirmative, primary federal judicial obligation to review all claims of privilege, and especially constitutional claims, invoked by a witness under the compulsion of a federal court to answer questions.[6]

2. How Should Parnas' and Gelbard's Claims Be Raised and Adjudicated? Why Does Their Position Not Endanger the Grand Jury's Lawful Functions?

The government made much in the Court below, and may do so here, of the argument that petitioners' claim would halt grand juries in their work. In its brief below, the government even relied upon the statement in *Cobbledick v. United States*, 309 U.S. 323, 327 (1940), that "The duration of (the grand jury's) life, frequently short, is limited by statute . . ." This argument has no

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[6]The right of judicial review is basic to all modern legal systems. See, *e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 5, clause 4 (in Council of Europe, *Report to the International Conference on Human Rights* [1968]).

application to cases involving special grand juries convened under the 1970 Crime Control Act, since the Act makes the grand jury's life three years, and the legislative history recognizes that these "organized crime" grand juries will typically sit for a long time. See 1970 U.S. Code Cong. & Ad. News 4014 ("typically lengthy organized crimes case"). Virtually all the cases raising the issues now before the Court involve lengthy grand jury proceedings, and some involve the "organized crime" provisions of the wiretap law as well. 18 U.S.C. §§2510-20. The grand jury's work will not be frustrated by changing the order in which a long list of witnesses testify in order to give a hearing to those who make a fourth amendment claim.[7]

But petitioners do not rely only upon their own, or this Court's power to predict the length of time grand juries will sit. A hearing on a fourth amendment violation is not a lengthy affair in any case, any more than a hearing on a fifth amendment privilege, a lawyer-client privilege, or an executive privilege is necessarily lengthy. The question to be decided is a legal one: Has some constitutional or other privilege been invaded, or would it be by compelling an answer to the grand jury's questions? Inquiry into the basis of the claim, going far enough to ensure that the privilege is properly invoked and not so far as to destroy it by

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[7]In trials and hearings of all sorts, a party (including the government) is often required to change the order of proof to permit leisurely disposition of a witness's claim of privilege or an opponent's claim of surprise. To experienced trial lawyers, the government's claim concerning the impracticality of petitioners' position makes no sense. At any rate, due process always takes a little longer than summary process, or drumhead process, or pistol-at-the-head process; in the end, it is a question of the kind of society you want. The framers of the Constitution chose a society in which justice and fairness should be primary, and enshrined their choices in the Bill of Rights.

revealing the privileged material to the public, has been outlined in many cases. See, for a particularly incisive statement, *United States v. Reynolds*, 345 U.S. 1, 7-10 (1953).

This Court has heard in other cases the claim that judicial review threatens governmental functions and should therefore be disallowed. The survival of the nation itself has been put forward as the basis of such claims, yet they have been rejected. *Estep v. United States*, 327 U.S. 114 (1946), accommodated the need for judicial review with the concerns for national security and about "litigious interruption" of the military service selection program. *Oestereich, supra,* and *Breen, supra,* are to the same effect. In *Gutknecht v. United States, supra,* the Court rejected the claim that unless local draft boards could be agencies of punishment, the Selective Service System could not function.

Parnas and Gelbard, in striking analogy to *Breen* and *Oestereich,* are not seeking to invade the grand jury's evidence, and make the district court a "super grand jury", any more than in *Oestereich* and *Breen* the Court was to be a "super draft board." They like *Breen* and *Oestereich,* raise a legal claim-violation of statute and constitution—susceptible of being framed in narrow compass and decided by reference to settled legal standards. (Indeed, if the argument under Point II, *infra,* is sustained, there would be ten days before their grand jury appearance is even scheduled within which they could obtain the desired judicial review, and therefore no interruption at all of the grand jury's work.)

D. The Problem of Standing Raised by the Ninth Circuit.

In *Carter v. United States*, 417 F. 2d 384, 388 (9th Cir. 1969), cert. denied, 399 U.S. 935 (1970), relied on below, the Ninth Circuit said of a claim similar to Parnas' and Gelbard's:

> "As witnesses, they have no standing to question the source of the government's information. It will be time enough to do that if any of them should ever become a defendant."

The concept of "standing" raised in *Carter* is difficult to understand, but should be dealt with, for it may have led the Court below into error.

The varying and sometimes recondite uses of the term "standing" by lawyers, text-writers and courts create considerable difficulty. The term may be used to refer to several quite distinct limitations upon the power of federal courts to decide cases. See generally *Flast v. Cohen*, 392 U.S. 83 (1968). First, standing may refer to the procedural capacity of a litigant to sue or be sued. Ehrenzweig, *Conflict of Laws*, §§ 11-24 (1959).

Second, "standing" is sometimes used to denote a limit upon the article three judicial power, and to refer generally to the requirement that litigants have a genuine and not a sham contrariety of interests, both qualitatively and quantitatively. Cases in which the requisite "qualitative" adversity was lacking include *Muskrat v. United States*, 219 U.S. 346 (1911), and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The question is double-edged in these cases: will the Court decline, on the basis of judicially-fashioned rules of restraint to take the case? (See *Muskrat*); and, on the other hand, may Congress bestow stand-

ing upon a class of litigants without falling afoul of the proscription on advisory opinions—stated affirmatively as the case or controversy requirement (see *Sanders Bros. Radio Station*). The "quantitative" dimension of standing was considered in *Flast v. Cohen*, 392 U.S. 83 (1968), in which the Court limited *Frothingham v. Mellon*, 262 U.S. 447 (1923). *Frothingham* had rejected a taxpayers' suit directed at a federal statute upon the ground that the interest of a taxpayer in the outcome of the litigation was but a comminute share of the interest of the community at large, and not sufficiently direct and immediate. See also *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

A third use of the term "standing" has been in reference to questions essentially of ripeness. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), is such a case. There the FCC had adopted a rule stating that licenses for television broadcasting would not be granted if the applicant had a direct or indirect interest in more than five other stations. Storer, which had reached the limit under the rule, sued for a declaration that the rule was invalid. This Court concluded that Storer had "standing" to sue, resting its decision upon a perception of the statutory judicial review standard and a finding of present harm to Storer, 351 U.S. at 197-99. The Court recognized that "standing", in the sense it had used the term, carried along with it the notion of ripeness. Taking the question before the court out of "standing" language, one could cast it as, "Should Storer have gone through the license-application process before coming to court?" This requirement may also be termed one of "finality." See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-56 (1951) (Frankfurter, *J.* concurring).

A fourth "standing" issue is that of "legal wrong," a term which appeared in Section 10 of the old Administrative Procedure Act and which now appears in the judicial review provisions of recodified Title 5, 5 U.S.C. § 702 (Supp. IV 1969). See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198-99 (1956); *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939). The "standing" issue in "legal wrong" cases really goes to the merits of the claim being asserted, for "standing" is denied or upheld based upon whether the harm complained of is legally cognizable.

Fifth: Closely related to the fourth meaning but distinct from it, is the issue of "standing" raised when B seeks to complain of a violation of rights which are said to "belong" to A. Mr. Justice Frankfurter termed this the problem of "directness." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 153-54 (1951). This fifth notion of standing has been an issue in search and seizure cases, most recently *Alderman v. United States*, 394 U.S. 165 (1969). In these cases, the Court has held that in a case, United States v. A, A cannot complain of the admission into evidence of items unlawfully seized from B. See also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149-55 (1951) (Frankfurter, *J.* concurring); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *NAACP v. Button*, 371 U.S. 415 (1963). Other "vicarious assertion" cases are collected and analyzed in Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599 (1962).

Parnas and Gelbard do not rest upon a "standing to suppress evidence" argument (the fifth type of standing mentioned above) any different from that applied

by the Court in *Alderman, supra*. Each claims to be a "party aggrieved" by an unlawful search directed at him.

Each clearly has a stake in the outcome of this proceeding, both through the invasion of his privacy and through the sanction which will be imposed upon him if he is unsuccessful in this Court, so the second type of standing mentioned above is present. The first and fourth types of standing are not in issue here.

The only sense in which "standing" could limit petitioners' right is the third mentioned above. The Ninth Circuit may have considered that a person whose privacy is invaded in front of a grand jury has no remedy unless and until an indictment is returned against him. Then, the unlawfully obtained evidence can be challenged and the government forced either to prove its case by lawful evidence or to dismiss the prosecution. This theory of "standing" would be that applied in *Storer, supra*. This theory, which might be applied to a prospective defendant who was not called before the grand jury and subjected to a compulsion to testify, is inapplicable to the present case.

In the discussion under Point II, we analyze in detail *United States v. Blue*, 384 U.S. 251 (1966), reserving our discussion to that point in the brief because of the reliance on *Blue* in the legislative history of the wiretap law. However, it bears saying here that this case has nothing to do with the situation in *Blue*. Parnas and Gelbard do not seek dismissal of an indictment against them on the ground that illegally-obtained evidence was adduced before the grand jury. They are not in the position of a criminal defendant who brings a suit in equity to challenge an illegal search

and is told that an adequate remedy at law exists by a motion in a criminal case, which would be another way of saying that his claim should be raised in the proceeding where the harm complained of has its most direct and immediate effect—on his freedom.

The true rule is this: Any person aggrieved by an unlawful federal search (*i.e.*, any person with "standing" in the *Alderman* sense) has standing (in the sense of a real contrariety of interests with the federal authorities) to bring an appropriate proceeding for return of property and suppression of evidence. Federal courts may, however, decline to hear such a suit on the grounds that the claimant lacks standing, in the sense of not having waited until the evidence was sought to be used against him: This is "standing" in the sense of ripeness, and may also be placed under a heading like "adequate remedy at law."[8]

The cases which deal with this question are legion, but every one of them recognizes that the federal courts have the *power* to hear a claim by a party aggrieved, and only a *limited discretion* to refuse a hearing on grounds of ripeness—the third kind of "standing" mentioned above. See, for example, *Smith v. Katzenbach*, 351 F. 2d 810, 814 (D.C. Cir. 1965) (Opinion by Leventhal, *J.*; Burger, *J.*, on the panel); *Foley v. United States*, 64 F. 2d 1, 3 (5th Cir. 1933); *Austin v. United States*, 297 F. 2d 356 (4th Cir. 1961), *mandate recalled and app. dism. on other grounds*, 353 F. 2d 513 (4th Cir. 1962); *Parrish v. United States*,

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[8]One of petitioners' counsel has, in another context, attempted to collect and analyze the case-law and texts dealing with federal courts' power and discretion to decline jurisdiction. See Tigar, *Judicial Power, the "Political Question Doctrine", and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135, 1136-67 (1970).

256 F. Supp. 793 (E. D. Va. 1966), *app. dism.*, 376 F. 2d 601 (4th Cir. 1967); *Plato v. Katzenbach*, 253 F. Supp. 1021 (N.D. N.Y. 1966); *Silbert v. United States*, 282 F. Supp. 635 (D. Md. 1968); *United States v. Arrington*, 159 F. Supp. 843 (D.D.C. 1958); *Lord v. Kelley*, 223 F. Supp. 684 (D. Mass. 1963), *app. dism.*, 334 F. 2d 742 (1st Cir. 1964). See also *Lankford v. Gelston*, 364 F. 2d 197 (4th Cir. 1966) (suit against state officers; injunction granted against illegal searches); *In re Fried*, 161 F. 2d 453 (2nd Cir. 1947), *cert. dism. on suggestion of Solicitor General*, 332 U.S. 807 (1947) (illegal confession extracted by third degree methods; pre-indictment intervention); *Morrow v. District of Columbia*, 417 F. 2d 728 (D.C. Cir. 1969) (ancillary jurisdiction of federal court in criminal matter). Compare *Rea v. United States*, 350 U.S. 214 (1956) (federal court has power, at the instance of the victim of an unlawful search, to enjoin a federal officer from testifying about the fruits of the search).

The law is, therefore, that Parnas and Gelbard could have brought independent suits in equity, or proceedings under some other provision of law, to get back the fruits of illegal wiretapping and prevent the use of such material. These suits would have been within the power of federal courts to entertain, provided Parnas and Gelbard alleged a violation of "their" fourth amendment rights. And had they been victorious, the fruits of illegality would simply not be available to the government to frame grand jury questions, or for any other purpose. This case would not have arisen. A federal court might, however, as a matter not of power but of prudence, decide that Parnas and Gelbard should wait until they could demonstrate a more immediate harm

before coming to court—await, that is, more ripeness or finality—and hold that they lacked "standing."

But now the harm is more than merely threatened and these cases could not be more ripe. Parnas and Gelbard could not have more "standing" than they do. They are "standing" in the jailhouse door, and will remain, unless they submit to questioning based upon exploitation of illegally-obtained material, and unless they make answers which will compound that initial illegality.

Not only is there no prudential limitation upon the federal judicial power to give them a hearing, but there is, as we show above, the clearest federal judicial duty to do so.

E. Concluding Remarks Under Point I.

For the reasons stated above, Parnas and Gelbard have a right to the relief they seek. They want their fourth amendment claim heard and decided before they face jail, just as a witness relying upon the fifth amendment wants the legitimacy of his claim determined before facing jail for refusal to answer.[9] This right is independent of the provisions of the statutes which govern wiretaps, and arises directly from the Constitution. Therefore, the Court must, we respectfully suggest, hold either (a) that the wiretap statutes, 18 U.S.C. §§2510-20, discussed under Point II have no relation to this case, and Parnas and Gelbard must have a hearing; or (b) that the wiretap statutes must be construed to avoid serious constitutional doubts and Parnas and Gelbard given a hearing under those statutes; or (c)

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[9]And as a draft registrant wants review, before facing jail, of the legality of local board action.

that the wiretap statutes are unconstitutional in denying a hearing to petitioners. We turn, having said this, to an analysis of the statutes, and show that they support the position taken above.

II.

PETITIONERS HAVE A RIGHT UNDER 18 U.S.C. SECTIONS 2515 AND 2518 TO A HEARING BEFORE THEY CAN BE MADE TO ANSWER QUESTIONS WHICH MAY BE DERIVED FROM ILLEGAL WIRETAPPING OR ENDURE IMPRISONMENT FOR THEIR FAILURE TO DO SO.

A. Summary and Analysis of the Wiretap Law.[10]

The 1968 Crime Control and Safe Streets Act, P.L. 90-351, authorized judicially-controlled wiretapping and other electronic surveillance in the investigation of certain crimes which are enumerated in the Act, which is codified as 18 U.S.C. §§2510-20. The Act lays out the methods for getting and using such evidence: An application for surveillance orders may be made to a federal judge[11] as provided in 18 U.S.C. §2518(1). The judge may require the application to be supplemented. 18 U.S.C. §2518(2). If he finds the statutory standards met, the judge may issue an eavesdropping order. §2518(3). The order must name the person whose communications are to be intercepted, must describe the communications facilities to be used, must identify the agency conducting the interception and the person authorizing the application, and must state the period of time for which the interception is authorized. §2518(4). 18 U.S.C. §2518(5) limits orders un-

[10]The text of the Act is in an Appendix to this brief.

[11]The statute authorizes state judicial wiretap orders, but these provisions are irrelevant to this case.

der the statute to thirty days. Sec. 2518(6) permits the issuing judge to have reports submitted to him or her concerning the interception. Sec. 2518(7) authorizes "emergency" interceptions without prior judicial approval. Sec. 2518(8) deals with custody of recordings. It provides that the issuing judge must give notice of the interception to the person against whom the order was issued and *may* give such notice to all those overheard by the device. Secs. 2518(9) and (10) provide for the rights of those overheard in the course of electronic surveillance under the statute.

So much for the details. The spirit of the Act is expressed in 18 U.S.C. §2515, quoted below, which prohibits the use of electronic surveillance evidence "if the disclosure of that information would be in violation of this chapter." This prohibition extends to all sorts of judicial and quasi-judicial proceedings. Other sections of the Act enact strict prohibitions on the manufacture, use and transportation of wiretapping and "bugging" devices.

In its discussion of the statute, the Senate Committee stated an intention to comply with the direction of this Court in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967).

This, is, therefore, a statute designed to go as far in the aid of the police as the Constitution permits, and yet to give protection to individual privacy. Whether the statute is constitutional is not an issue in this case. See generally, Schwartz, *The Legitimation of Electronic Eavesdropping*, 67 Mich. L. Rev. 455 (1969);

Lyon, *Note: Wiretapping and Electronic Surveillance, Title III of the Crime Control Act of 1968*, 23 Rutgers L. Rev. 319 (1969). Petitioners suggest that the statutory language which recognizes the rights of the wiretapped should be given a generous reading to protect individual liberty, and to avoid constitutional doubt.

But the argument below demonstrates, we submit, that whether the reading be remorselessly literal or smilingly generous, the statute provides petitioners with the following rights:

1. The right to prevent the use before the grand jury of any information obtained in violation of the Act, including information obtained in violation of the fourth amendment. See Point II, B, *infra.*
2. The statutory right to notice, 10 days before their grand jury appearance, that information obtained by electronic surveillance is going to be used in questioning them. Point II, C, 1, *infra.*
3. The statutory right, after receipt of such notice, to a hearing before their grand jury appearance, or in the alternative, after they have duly invoked their statutory and fourth amendment rights before the grand jury and before they are in danger of contempt sentences. Point II, C, 2, *infra.*

Finally, we argue under this section that nothing in *United States v. Blue, supra,* or in the legislative history undermines these conclusions. Point II, D *infra.*

B. Section 2515 of the Wiretapping Act Mandates a Hearing Such as Petitioners Seek.

Sec. 2515 states:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, *grand jury,* department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter." (Emphasis added.)

This section, standing by itself, creates a statutory right for anyone overheard illegally to have such evidence suppressed in a grand jury hearing.

As a majority of judges held in the Third Circuit case of *United States v. Egan,* 39 U.S.L.W. 2724 (3rd Cir. 1971) (en banc), this provision requires a hearing for any grand jury witness who has been informed by the government, or even who merely suspects that there is a wiretapping material which it may use in its formulations of questions to be put to the witness. The witness may "stand mute" and rely upon §2515's prohibition on use of illegally-obtained materials.[12] The language of the statute is so uncompromisingly clear that even if there were no statutory remedy prescribed to protect this right, there would be no question but that the witness has some protection against the invasion of his privacy, which the government in this case has been so anxious to invade.

[12]See Opinion of Judges Rosenn, Sertz and Van Dusen.

As Judge Adams held in Egan,

> "Section 2515 is an unequivocal bar to questioning one before a grand jury if the questions are derived from electronic surveillance conducted in the absence of a properly issued warrant and aimed at the witness if the witness himself (sic) objects to the interrogation. See 18 U.S.C.A. §§2511, 2516, 2518."

Sec. 2515 therefore recognizes, by its terms, a full-fledged right to be free of illegal eavesdropping and wiretapping.[13] It is quite a forward-looking provision, when one examines it closely. It seems to recognize that the real damage to human beings from unlawful electronic surveillance is the invasion of their privacy. See A. Westin, *Privacy and Freedom*, C. 3 (1967), and that prohibition on use and disclosure of the material is the only way to redress an illegal invasion.[14]

Even if the statute did not contain any remedy provision at all, or even if the remedy provision of §2518 is held inapplicable to petitioners, §2515 would provide the basis for complete relief in this case and the complete vindication of petitioners' position. Sec. 2515 creates a federal right, and by doing so imposes a duty on federal officials to honor and enforce that right. Compare *Rea v. United States, supra.* That right is enforceable in any appropriate proceeding, by the invocation of any settled principle of federal remedies law. Parnas and Gelbard could have filed an injunction suit, subject to the general principles of equity jurisdiction.

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[13]Even the §2517 "intra-governmental" disclosure sections permit disclosure only of lawfully-intercepted communications.

[14]*Cf.* the discussion at Point II, D, concerning legislative history.

See *Dellinger v. Mitchell,* 39 U.S.L.W. 2487 (D.C. Cir. 1971). *Cf. Stamler v. Willis,* 371 F. 2d 413 (7th Cir. 1966), (reh. den. en banc 1969). And see the cases collected at Point I, C *supra.* They could have filed a Federal Rule of Criminal Procedure 41(e) motion. See *Smith v. Katzenbach, supra.* Or, as the Third Circuit held in *Egan, supra,* and as appears from a common-sense reading of the statute's unambiguous language, they could file a pleading invoking the illegality of electronic surveillance about to be used against them as a basis for not answering questions before the grand jury and as a defense to a contempt proceeding. This last is just what they did, and they were right in doing so.[15]

C. For the Right Recognized by Sec. 2515, There Is a Statutory Remedy Provided by Secs. 2518(9) and (10)(a).

1. Notice Is Required.

Sec. 2518(9) provides in part:

> "The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than 10 days before the trial, hearing, or other proceeding, has been furnished with a copy of the court order and accompanying application, under which the interception was authorized or approved."

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[15]Even the legislative history agrees with this construction, for it says that §2515 must be taken "along with the criminal and civil remedies", a clear reference to the general federal judicial power. 1968 U.S. Code Cong. & Ad. News 2185.

This 10 day notice may be dispensed with if the judge finds that the delay will not be prejudicial. Id. Parnas and Gelbard were told informally that the government had and would use wiretap material to question them but the only sort of "notice" served upon them was a grand jury subpoena.[16]

The government has admitted in the courts below that its questioning of Parnas and Gelbard would result in "disclosure" of intercepted communications. Thus, under §2518(9), they are entitled to ten days' notice of the interception, within which time they could take appropriate action under some applicable federal remedies law. (We argue below, Point II, C, 2, that §2518(10) is such a law, but the discussion above demonstrates that there are many other jurisdictional bases.) The district judge held, however, that a grand jury was not a "trial, hearing or other proceeding", and that §2518(9) does not require disclosure. This holding cannot be defended without doing violence to the language of the statute, to settled principles of statutory construction, and to the English language.

"Proceedings in court" encompasses many ancillary proceedings, and is surely broad enough to include

[16]Congressional intent to "conform" with existing warrant procedure is manifest in §2518(8)(d), which sets up an inventory mechanism. 1968 U.S. Code Cong. & Ad. News 2194. The judge has the duty to "cause to be served, upon the persons named in the order (authorizing the interception) or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice . . ." The inventory will be served not later than 90 days after the termination of the interception and will include notice of the entry of the order to intercept, the period of interception and whether wire or oral communications were intercepted. Of course, the fact that the judge may "in his discretion" give the subject of the tap the right to scrutinize portions of the intercepted communications belies strict Congressional adherence to compliance with F. R. Crim. P. 41, since a literal compliance would give the right to an inventory.

grand jury proceedings. See 34 Words and Phrases, pp. 190-91 (heading "Proceeding in Court"). (Perm. ed.), and 1970 Pocket Part pp. 25-26.

Further, the statute contains convincing internal evidence that the word "proceeding" includes a grand jury proceeding. Most strikingly, §2517(3), in its 1968 version, referred to "criminal proceeding" and "grand jury proceeding," making it evident that the generic term "proceeding" includes a "grand jury," as well as a "criminal" proceeding. In 1970, the Congress amended the Act to make it simpler, and substituted "any proceeding held under the authority of the United States or of any State or political subdivision thereof." Since no relevant change in meaning is presumably intended by this clerical amendment, the statutory term "proceeding," standing alone, now includes a grand jury proceeding at one point in the Act. Moreover, §2515 includes under the types of "proceeding" to which it applies, a "grand jury," again making clear that this term has the inclusive sense petitioners claim.

The statute should, petitioners suggest, be read in this common-sense way since it is on its face unambiguous. The Court should read the statute, we submit, and reject appeals to ease Congress's mind. See generally *United States v. O'Brien*, 391 U.S. 367 (1968); *United States v. Oregon*, 366 U.S. 643, 648 (1961); *Thorne, Construction of Statute*, in *How to Find the Law*, 353 (1949).

If "proceeding" includes grand jury proceeding, petitioners were deprived of their right to notice. This right would but enforce the due process guarantee of a timely hearing, *Goldberg v. Kelly, supra*, and a hearing at which notice of the issues is given to the affected party. *In re Ruffalo*, 390 U.S. 544 (1968).

2. A Hearing Must Be Held.

18 U.S.C. §2518(10) provides:

"Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order or authorization or approval. Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice."

The statutory requirements of §2518(10) that a hearing be held before the contents of a wiretap can be used must, in the absence of any statutory direction to the contrary, be interpreted to include claims raised by grand jury witnesses. The argument at Point II, C, 1, *supra*, establishes that much.

3. Secs. 2518(9) and (10) Read Together.

If Secs. 2518(9) and (10) be read together, and with §2515, the statute as a whole makes literal sense, and fairly good sense at that. We need not consider whether there should be a wiretapping statute, or whether other sections go too far in conferring authority to tap: These remedy provisions read as an internally-consistent whole. Sec. 2515 prohibits the use of information obtained unlawfully, and creates (remembering the fourth amendment, we should perhaps say "recognizes") a right. Then §2518(9) and (10) provide an orderly means to enforce that right, when it is threatened in the context of certain kinds of proceedings.

These sections therefore enforce the due process command of a timely, adequate hearing. If Parnas and Gelbard were worried only about the fact of interception, they could proceed under §2520 with a damage suit. But they are concerned not only about the invasion of their privacy, but the use to their detriment of the material obtained. They therefore have the remedy provided by §2518.

If these sections are not read so as to provide this remedy, they are, for the reasons stated in Point I, unconstitutional.

D. The Legislative History and United States v. Blue.

The government seems to believe that the statute should be resorted to only if the legislative history is ambiguous, so stoutly did they urge below that the statute must be read to deny petitioners a remedy.

The legislative history relied on by the government is the following. With reference to §2518(10):

> "It provides the remedy for the right created by Section 2515. Because no person is a party as such to a grand jury proceeding, the provision does not *envision* the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. (Blue v. United States, 86 S. Ct 1416, 384 U.S. 251 (1965)." (Emphasis added.)
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> 1968 U.S. Code Cong. & Ad. News 2195.

The legislative history does not, however, speak with one voice. The portion quoted is impossible to reconcile with the spirit of the discussion of §2515:

> "It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury . . . or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. The provision must, of course, be read in light of section 2518(10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly (*Nardone v. United*

States, 58 S. Ct. 275, 302 U.S. 379 (1937)) or indirectly obtained in violation of the chapter. (*Nardone v. United States,* 60 S. Ct. 266, 308 U.S. 338 (1939). There is, however, no intention to change the attenuation rule. See *Nardone v. United States,* 127 F. 2nd 521 (2d), certiorari denied, 62 S. Ct. 1296, 316 U.S. 698 (1942); *Wong Sun v. United States,* 83 S. Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law. See *Walder v. United States,* 74 S. Ct. 354, 347 U.S. 62 (1954). But it does apply across the board in both Federal and State proceeding. Compare *Schwartz v. Texas,* 73 S. Ct. 232, 344 U.S. 199 (1952). And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. Compare *Adams v. Maryland,* 74 S. Ct. 442, 347 U.S. 179 (1954); *Mapp v. Ohio,* 81 S. Ct. 1684, 367 U.S. 643 (1961). The provision thus forms an integral part of the systen of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications."

1968 U.S. Code Cong. and Ad. News 2185.

If, indeed, "such a suppression rule is necessary and proper to protect privacy" why should it not protect the privacy of a grand jury witness, particularly those such as petitioners who were not themselves the target of the wiretapping, and against whom there was no finding of "probable cause" such as is required by §2518(3) before a judge may issue an order author-

izing interception of wire communications? The only privacy which the government intends to accord to petioners Parnas and Gelbard is that of a prison cell.

This discordant note aside, the government's reliance upon *United States v. Blue, supra,* is utterly mistaken. Perhaps it would be helpful to recall *Blue*. Ben Blue was served with jeopardy assessments, had his assets seized, and tax liens recorded by the Internal Revenue Service. He then received a 90-day letter, and within that time filed petitions in the Tax Court to challenge the alleged deficiencies. While the civil case was pending, and more than a year later, the government obtained a six-count indictment charging evasion, Internal Revenue Code §7201, and wilful false statements, Internal Revenue Code §7206. Blue moved to dismiss the prosecution, claiming that the indictments were barred because the evidence used to obtain them was illegally compelled in violation of the fifth amendment, the government having relied upon information disclosed in the Tax Court proceedings. The district court granted the motion, also noting that Blue would have to incriminate himself in the criminal case in order to prosecute his Tax Court action. This Court held:

1. The district court sustained a plea in bar, giving this Court jurisdiction on direct review. 18 U.S.C. §3731.

2. "Even if we assume that the government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial." 384 U.S. at 255. If tainted evidence is presented to a grand jury, this is not a "basis

> for abating the prosecution pending a new indictment, let along barring it altogether." 384 U.S. at 255 n.3, citing authority.

The Court said, also at p. 255, that barring prosecutions where the grand jury evidence was proven tainted would interfere to "an intolerable degree with the public interest in having the guilty brought to book."

Blue stands, therefore, for the proposition that a prosecution will not be abated or dismissed if illegally-obtained evidence was adduced before the grand jury.[17] Read most favorably to the government, *Blue* might even be authority that illegally-obtained evidence may be introduced before a grand jury, and that the victim of the illegality cannot invade the grand jury's deliberations with a motion to suppress it. Petitioners do not concede this latter reading, but are willing to assume it because it makes no difference to their position here.

Blue involved the fifth amendment's self-incrimination clause. Read as above, *Blue* holds that the defendant cannot have his prosecution dismissed, and cannot while the grand jury is sitting challenge the evidence being taken before it. But suppose the government called *Blue* as a witness, and began to question him about his taxes. Would the government say he could not in-

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[17]Although the government is aware that often when a motion to suppress is sustained, the government's whole case collapses and must be dismissed, particularly if the item suppressed is an unlawful substance or a crucial intercepted conversation; typically, in such cases, the substance or the conversation will have been the main part of the government's grand jury presentation.

voke his privilege against self-incrimination? Of course not. Would the government say that he had to go to jail or else incriminate himself, and rely on the principle that no one may challenge evidence being taken before a grand jury? Of course not.

And here is the crucial distinction. Parnas and Gelbard are not bystanders to the grand jury proceeding, who fear that something is going on in the grand jury room which involves their privacy. They *know* that they are to be *questioned* on the basis of a wiretap. They believe that the tap was illegal. They are assured that the questioning is under compulsion, and that unless they make answer or show some good cause, they will go to jail. This is the case which *Blue* does not reach, for the simple reason that it is governed by another body of law altogether: the body of law which governs all objections by a witness to compelling testimony.

The legislative history may be read to limit the right of bystanders to invade grand jury proceedings with their writs, but it may not—consistently with reason, common-sense, the literal language of the statute, and the plain command of the Constitution—be read to limit Parnas' and Gelbard's right to raise a point of law in the hope of escaping jail.[18]

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[18]The statute recognizes the danger of unlawful evidence getting before a grand jury. In §2517(3), it says that a wiretapper may testify only about material overheard in compliance with the Act.

III.

WHAT KIND OF A HEARING SHOULD BE HELD: THE MEANING OF ALDERMAN V. UNITED STATES.

Alderman v. United States, 394 U.S. 165 (1969), is important to the decision of this case. It does, as noted above, fashion a standing rule which applies to electronic searches as to all others. However, if the Court decides to sustain the legal position of Parnas and Gelbard and hold that they are entitled to a hearing, *Alderman* determines what kind of a hearing that should be.

If Parnas and Gelbard have a right to prevent illegal electronic surveillance from being used as the basis of questions put to them before the grand jury, they must have a means to enforce that right We suggest that the first inquiry is: "Has there been an illegal electronic surveillance which petitioners have standing to suppress?" This question must be decided based upon an adversary hearing. *Giordano v. United States,* 394 U.S. 310 (1969), and *Taglianetti v. United States,* 394 U.S. 316 (1969), direct the district court, when a question of legality is raised, to "find the facts." Fact-finding implies an adversary proceeding, in which the circumstances surrounding the surveillance would be revealed. There would not, at this stage, necessarily be disclosure of the logs of the surveillance, except to the extent necessary to determine legality. Disclosure of the logs is a right only after a determination of illegality.

There has been some dispute about the meaning of *Taglianetti* and *Giordano* in the district courts. This Court should make it clear now that fact-finding, even when the facts concern surveillance, must be done in an open hearing just as when a search for tangibles objects is being challenged. Perhaps, as in Jencks Act cases, some compromises with full-blown adversary proceedings might be tolerated. See *Campbell v. United States,* 365 U.S. 85 (1961), 373 U.S. 487 (1963), but petitioners do not see the reason for such a concession.

Then, if there is a determination of illegality, petitioners should have access to the logs of their conversations. After all, they cannot well ensure that illegal material is not used unless they can by reference to the logs establish the likely provenance of illegality. Here the command of *Alderman* is the strongest: "Adversary proceedings" have "superiority as a means for attaining justice"; "ex parte procedures" are inadequate. 394 U.S. at 183-84. All the cautions of *Alderman* apply concerning the danger of a hearing gone beyond the bounds of necessity and good sense, but the central teaching remains: Petitioners must show that the tap was illegal, then the government, having disgorged the logs, must show its proposed line of inquiry to be untainted.

This, petitioners submit, is a common-sense means of affording the right to a hearing, whether the hearing is granted under the statute or as a matter of constitutional right.

IV.

SOME OBSERVATIONS ON THE NEW GRAND JURY.

This case is being fought out as the Justice Department is pouring unprecedented resources into the convening of grand juries. Petitioners believe that a word about its context is necessary. We do not now live in the 12th Century, when a grand jury convened under the Assize of Clarendon would make informal inquiry about crimes committed in the vill or hundred and pass this gossip along to the King. It would be naive and dangerous nonsense to claim that the modern federal grand jury bears any resemblance to an independent, self-governing body of twenty-three citizens using common sense and meager resources to ferret out crime.

Instead, the grand jury is run by a new breed of government lawyer—the "strike force" lawyer—who has all the resources of the Federal Bureau of Investigation at his command. These strike forces contain men and women who travel from city to city working with different grand juries. Some of them are headquartered under the name "Organized Crime", and others under the name "Internal Security." Using the investigative power of the grand jury, they have managed to create a mechanism which the Federal Rules of Criminal Procedure and accepted principles of criminal justice had long denied them: They can use, on behalf of the government, a roving compulsory process to compel almost any witness to testify on almost any subject, offering the alternative of untold months in jail upon summary committal.

Counsel have seen these new lawyers at work. Their power is equalled only by their zeal. We intend no personal attack upon them. We submit,

however, that there is a real danger they are abusing their powers. For the new grand jury, there should be a new look at the old law of constitutional rights, statutory rights, and evidentiary privileges. There should be a renewed attention to the procedural protections which go under the name "due process." Just as the fiction of informal and friendly adjudication in juvenile courts gave way to the stern reality of summary justice for young people, see *In re Gault*, 387 U.S. 1 (1967), and just as the "little groups of neighbors" in the local draft board came to be recognized as a harsh and sometimes brutally unfair summary tribunal, see *Gutknecht v. United States*, 396 U.S. 295 (1970), and just as the all-seeing and informal Federal Communications Commission was seen to need some citizen participation in a formal, quasi-judicial due process way, see *Office of Communication of United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966), so the summary justice of the grand jury and the enforcing district judge must yield to a more sensitive appreciation of the power to commit for contempt.

Conclusion.

For the reasons stated above, the judgment of the Ninth Circuit should be reversed, and the cause remanded to the district court with directions to vacate the order of commitment and afford them notice and hearing as prayed herein.

Respectfully submitted,*

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*Counsel acknowledge with great thanks the research and drafting assistance rendered by Madeleine R. Levy, law clerk.

APPENDIX OF STATUTES AND RULES.

U.S. Constitution, amendment 4:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Constitution, amendment 5:

". . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

18 U.S.C. §1826(a):

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

18 U.S.C. §2510-20:

§ *2510. Definitions*

As used in this chapter—

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by

a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means—

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.

§ 2511. Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept, or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component

thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) (i) It shall not be unlawful under this chapter for an operator of a switchboard, or

an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided*, That said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(ii) It shall not be unlawful under this chapter for an officer, employee, or agent of any communication common carrier to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, pursuant to this chapter, is authorized to intercept a wire or oral communication.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of

the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any

trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

§ 2512 (omitted).
§ 2513 (omitted).
§ 2514 (omitted).

§ *2515. Prohibition of use as evidence of intercepted wire or oral communications*

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ *2516. Authorization for interception of wire or oral communications*

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501-(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h) or (i) of section 844 (unlawful use of explosives), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition

of business enterprises of gambling), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property, section 1963 (violations with respect to racketeer influenced and corrupt organizations);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or

law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evi-

dence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in acordance with the provisions of this chapter. Such application shall be made as soon as practicable.

§ 2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent ju-

risdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional com-

munications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the

applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is

denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his

counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

§ 2519. Reports concerning intercepted wire or oral communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision

of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1) and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

18 U.S.C. § 3331(a):

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated, Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

Federal Rules of Criminal Procedure, R. 41(e):

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use of evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

NO. 71-110

Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
FILED
JAN 28 1972
E. ROBERT SEAVER, CLERK

DAVID GELBARD and SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER GELBARD

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With the addition of the authorities herein cited petitioner Gelbard adopts the authorities in the brief in the instant case titled "Brief for Petitioners."

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NO. 71-110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1971

DAVID GELBARD and SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER GELBARD

QUESTIONS PRESENTED

Petitioner Gelbard adopts herein the Questions Presented in the brief submitted in the instant case under the title "Brief for Petitioner" and submits the following question for resolution:

1. Whether the Constitution and statutes of the United States require that an evidentiary hearing be afforded a grand jury witness on motion to enjoin the judicial and executive branches of the government from utilizing evidence obtained by virtue of the federal wire tap statutes (18 U.S.C. § 2510, *et seq.*), where there is cause to believe said evidence was unconstitutionally and unlawfully obtained.

SUMMARY OF THE ARGUMENT

Petitioner Gelbard adopts *in toto* the argument in the brief submitted under the title "Brief for Petitioners" in the instant case. However, petitioner would like to present certain aspects of the case in a slightly different context and to explore the nature of the hearing to be granted under the facts of this case.

Initially, petitioner maintains that the federal wire tap statute and 28 U.S.C. § 1826 (under which petitioner was incarcerated) must be construed to allow a hearing to petitioner in order to avoid certain constitutional infirmaties which would otherwise arise. This Court has recently made clear the absolute necessity for a hearing under a variety of circumstances ranging from seizure of film to imposition of contempt. The same protection as is presently afforded in the area of rights protected by the First and Fifth Amendments must be accorded to the rights under the Fourth and Ninth Amendments. Petitioner maintains further that the utilization of any evidence seized in violation of constitutional rights, or the introduction of that evidence into any proceeding regulated by the judiciary,

presents a situation under which this Court should exercise its supervisory powers in order to secure conformance with constitutional mandates and to prevent the complicity of the judiciary in illegal activity.

OPINION BELOW

The opinion of the Court of Appeals is reported at ..... F.2d ..... (9th Cir. 1971).

JURISDICTION

The Ninth Circuit Court of Appeals rendered its opinion and judgment on June 8, 1971. A timely petition for rehearing was filed, and rehearing was denied on June 23, 1971. The Petition for Certiorari was filed on July 22, 1971, and certiorari was granted December 13, 1971. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner Gelbard adopts herein the constitutional provisions and statutes submitted in the instant case under the title "Brief for Petitioners" and submits the following additional authorities:[1]

18 U.S.C. § 3504

California Penal Code § 631 *et seq.*

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1. The pertinent portions of these authorities will be submitted to the Court in a defetred appendix.

STATEMENT OF THE CASE

A telephone tap under 18 U.S.C. §§ 2516 through 2518 was conducted of an unknown person, probably an alleged bookmaker. This tap is hereinafter referred to as the "primary tap." At the time of the primary tap and the authorization for the interception, it is probable that Gelbard's name was unknown to the government, and became known only because his conversations were also intercepted in the course of his conversing over the telephone with the primary tap. The interceptions of Gelbard's conversations are hereinafter referred to as the "secondary tap."

As a result of the secondary tap, a search warrant issued to search and seize papers, books and other materials of Gelbard, the "probable cause" being (it is surmised) the conversations overheard in the course of the secondary tap. On January 25, 1971, the Honorable David W. Williams denied the motions to suppress the search warrant and for the production of the affidavits in support of the search warrant, and denied an evidentiary hearing therefor, summarily.

After the issuance of the search warrant to seize Gelbard's papers and other materials, Gelbard was subpoenaed to testify before the grand jury.

At the February 17, 1971 hearing, petitioner herein *did* refuse to answer any questions, on the ground that he had not been given the opportunity to review the application for the wire tap order, the order itself, or any conversations in which he engaged, so that petitioner could make appropriate motions.

Petitioner had attempted to file a motion to suppress evidence, to challenge the validity of the search warrants under Rule 41 of the Federal Rules of Criminal Procedure, and through his attorney had attempted to obtain an order shortening time so that such motions could be heard before the date on which he was to appear before the grand jury. When the order shortening time was denied, petitioner sought a Writ of Mandate/Prohibition from the Ninth Circuit Court of Appeals, which petition was denied "out of hand" (9th Cir. - No. 71-1065).

After the refusal to answer questions at the February 17, 1971 hearing, petitioner was then directed by the court to answer the questions; and upon further refusal of this court order, petitioner was held in contempt, with the opportunity to purge himself in the event he answered the questions, presumably pursuant to 28 U.S.C. § 1826(a). Pursuant to 28 U.S.C. § 1826(b), a stay of the order of contempt was issued by the District Court, and then by the Court of Appeals pending the prosecution of the appeal in expedited fashion. The Court of Appeals affirmed the lower court's contempt citation on June 8, 1971.

ARGUMENT

I

The Due Process Clause Of The United States Constitution Requires That Petitioner Be Given A Hearing Before Being Jailed, Pursuant To Title 28 United States Code § 1826, For Refusal To Answer Questions Based Upon An Illegal Invasion Of Privacy Pursuant To A Wire Tap Under Title

18 United States Code § 2510 *et seq.*

A. Under the circumstances of the instant case, a hearing is required by the Constitution in order to determine if there has been a violation of petitioner's rights.

This Court has made clear that due process requires the allowance of an adversary hearing under certain circumstances. This requirement is by no means limited to criminal actions or criminal defendants, but is based on a need to protect the loss of a constitutionally protected right. Obviously, the need for such a procedure is increased in a situation in which the failure to allow a hearing will itself result in a constitutional injury. Thus, a hearing is required under the First Amendment prior to seizure of allegedly obscene material in order to avoid the injury of censorship consequent to an illegal seizure. *Blount v. Rizzi* (1971), 91 S.Ct. 423. The right to be impartially heard and to challenge governmental action prior to the imposition of sanctions is fundamental under our system, and this right should be dispensed with only under the most exigent of circumstances. *Green v. United States* (1961), 365 U.S. 301. This concept has been consistently applied in the area of criminal contempt (*Bloom v. Illinois* [1968], 391 U.S. 194; *Groppi v. Leslie* [Decided January 13, 1972 - No. 70-112]). Similarly, the right to object to a violation of Fifth Amendment rights before the grand jury, and to have a speedy determination thereon, is well recognized. *United States v. Monia* (1943), 317 U.S. 424.

There is very little rational distinction between granting a hearing on waiver of Fifth Amendment rights as opposed

to Fourth or Ninth Amendment rights. A distinction could perhaps be drawn based upon the notion that the giving of testimony is itself the act which is prohibited by the Fifth Amendment. However, this Court has recognized the concept of the "fruit" of illegal activity. (In search and seizure cases see: *Wong Sun v. United States* (1963), 371 U.S. 471; with regard to coerced confessions see: *United States v. Bayer* (.....), 331 U.S. 532; *Darwin v. Conn* (1968), 391 U.S. 346, concurring and dissenting opinion by Justice Harlan.) Furthermore, with regard to a Ninth Amendment claim, the testimony itself is an intrusion into privacy.

Consequently, petitioner maintains that before a sanction, in the form of contempt, can be imposed upon a grand jury witness asserting a constitutional claim, the minimum protection of due process would require a hearing to determine the validity of that claim. It is difficult to imagine that the dictates of due process of law can be summarily avoided based on a need to expedite criminal investigation. If constitutional guarantees are to mean anything, they would seem to demand that liberty not be sacrificed to inquisition. The expediency of investigation can too easily erode these freedoms, and the time necessary to explore a constitutional claim is certainly worth the price of protecting the witness' rights and the integrity of the Constitution.

B. The Constitution of the United States demands that neither the judiciary nor the executive branches of the government utilize, for any purpose, evidence seized in violation of petitioner's constitutional

rights.

This Honorable Court has considered a variety of cases which dealt with the need to formulate workable rules for insuring that the mandate of the Fourth Amendment is followed both by law-enforcement officials and by the judiciary itself. In this regard, with special emphasis on the federal judiciary, the Court has long recognized that it is vested with the authority to utilize its "supervisory" powers in order to regulate the administration of justice throughout the federal system. One of the earliest cases in this area expressed (the necessity to have) concern for law-enforcement activities when the ". . . . courts themselves become instruments of law enforcement." *McNabb v. United States* (1943), 318 U.S. 332. Subsequently, in *Rea v. United States* (1956), 350 U.S. 214, the Court again exercised its supervisory powers to restrain federal officers from testifying in state courts concerning evidence seized in violation of Fourth Amendment rights. The counterpart to this case was *Elkins v. United States* (1960), 374 U.S. 206, in which the so-called "silver platter doctrine" was abrogated by this Court. The notion of the need to exercise the supervisory powers of the Court again arose in *Mallory v. United States* (1957), 354 U.S. 449, in which case this Court outlawed confessions obtained in a period of detention which violated the requirements of the Federal Rules of Criminal Procedure, Rule 5(a). Similarly, in *Katz v. United States* (1967), 389 U.S. 347, and in *Berger v. New York* (1967), 388 U.S. 41, this Court was ordered to the supervisory powers to implement the Congressional policies embodied in the Federal Communi-

cations Act.

Thus, the ability and duty of the Court to prohibit the use of unconstitutionally seized evidence has a long history in federal law. In this regard, it should be noted that the Fourth Amendment is certainly not limited in its effectiveness to the remedy of suppression of evidence. As discussed, *supra,* the exclusionary rule was itself merely a means to enforce the dictates of the amendment. It has further become apparent that the guarantee against unreasonable searches and seizures embodied in the Constitution is capable of providing whatever remedy is necessary to insure its vitality. Thus, in *Bivens v. 6 Unknown Narcotics Agents* (1971), 91 S.Ct. 101, this Court has allowed a civil remedy for violation of Fourth Amendment rights. The *Bivens* case makes clear that the Fourth Amendment is not merely an amendment to afford suppression of evidence in a criminal trial, but it is a provision which is to a large degree self-enforcing.

It is the position of petitioner Gelbard in this case that the utilization of evidence in a grand jury proceeding, which is itself a proceeding regulated by the judiciary, violates the dictates of the Fourth Amendment and necessitates the exercise of this Court's supervisory powers to insure that such evidence is not used *at all.* The rationale for this position is that under the cases cited above, this Court has the duty to supervise the judiciary in order to prevent its involvement in or condonation of the illegal activities of federal officers. Furthermore, under the present development of the grand jury system, in which the executive branch, through the United States Attorney, is primarily, if not totally, responsible for the presentation of

evidence and the verdict reached, it would appear that the judiciary has abrogated its duty to regulate its internal functions and has allowed the grand jury to become a technicality in which the need to follow the Constitution has somehow been dispensed with.

Thus, petitioner submits that under the supervisory powers of this Court there exists a duty to insure through a hearing that such illegal evidence does not creep into the grand jury proceedings and does not thereby tarnish the judiciary.[2]

There certainly can be no doubt that this Court has recognized the need for complete federal review of constitutional claims, especially claims dealing with *possible* violations of Fourth Amendment rights. *Koufman v. United States* (1969), 394 U.S. 217.

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2. Although petitioner is convinced of the correctness of the need for an exercise of the supervisory powers of this Court to prevent the utilization of unconstitutionally seized evidence before the grand jury, it should be noted that the most restrictive remedy from which petitioner could take advantage is the right to personally refuse to answer any questions propounded *to him* which are based on information directly or indirectly obtained through a violation of his constitutional rights. In this restricted form, petitioner does not ask that the illegally obtained evidence be suppressed, or that it not be used as a basis for questions posed to others. He wishes merely to invoke a personal right not to answer such questions.

Petitioner submits that this proposition is entirely consistent with–and required by–the Constitution and the laws of the United States. Certainly, there is no doubt that both the Fourth and Ninth Amendments deal with individual rights and protect the person. *Katz v. United States, supra; Griswold v. Connecticut* (1965), 381 U.S. 479. There is thus nothing illogical in allowing these rights to be exercised *by the person.* Furthermore, the analytical distinction between assertion of a constitutional right by a witness before the grand jury and the suppression of evidence obtained in violation of that right is not foreign to our law. For it is quite clear that a grand jury witness may refuse to answer a question based on Fifth Amendment grounds (*United States v. Monia, supra*), but that he may not subsequently quash the indictment on the ground that such evidence was the basis of the grand jury's finding. *United States v. Blue* (1965), 384 U.S. 255. Thus, even if the Court should not allow suppression of wire tap evidence, the issues with regard to a refusal of a witness to answer a question based on such evidence are completely different.

When examined in this light, the standing issue raised below by the Ninth Circuit becomes illusory. The standing issue, properly phrased under this heading, is whether a third party, a "non-aggrieved person," may refuse

C. **The statutory scheme is consistent with petitioner's request for a hearing.**

The statutory scheme of the wire tap statute with special regard to requirements for a hearing, especially 18 U.S.C. §§ 2515, 2518(9), and 2518(10(a), has been exhaustively examined in the "Brief for Petitioner," and those authorities and arguments are adopted herein. Petitioner, however, would draw special attention to 18 U.S.C. § 3504, a part of Public Law 91-452. That section provides:

> "§ 3504. Litigation concerning sources of evidence
>
> "(a) *In any* trial, *hearing, or other proceeding* in or *before any* court, *grand jury*, department, officer, agency, regulatory body, or other authority of the United States—
>
> "(1) *upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act* or because it was obtained by the exploitation of an unlawful act, the opponent of the claim

---

(2. cont'd)
to answer the questions based on the illegal evidence. Since the Fourth Amendment protects the person, it is illogical to assume that an aggrieved party, at any stage, cannot complain of the invasion of his rights. For, as we have seen, this Court has recognized personal remedies consonant with the intrusion. *Bivens, supra.*

With regard to the Ninth Amendment right to privacy, the same arguments as above apply generally. At this point, however, the unique statutory provisions of the State of California in the area of privacy become relevant through California Penal Code § 630, *et seq.* California has acted under the Ninth Amendment to protect the privacy of its citizens by outlawing wire taps of the kind here presumably utilized by the government. Thus, the wire tap act is, in California, a violation of the Ninth Amendment to the reservation of powers of the Tenth Amendment. If petitioner had responded to the questions of the grand jury, he would necessarily be coerced into relinquishing his rights under the Ninth Amendment. Before this drastic result is accomplished, petitioner should be able to assert his privilege and have the claim adjudicated.

shall affirm or deny the occurrence of the alleged unlawful act;

"(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

"(b) As used in this section *'unlawful act' means any* act the *use of any electronic, mechanical, or other device* (as defined in section 2510(5) of this title) *in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.*

"(b) The analysis of chapter 223, title 18, United States Code, is amended by adding at the end thereof the following new item:

'3504. Litigation concerning sources of evidence.'

"Sec. 703. *This title shall apply to all proceedings,*

regardless of when commenced, occurring after the date of its enactment. Paragraph (3) of subsection (a) of section 3504, chapter 223, title 18, United States Code, shall not apply to any proceeding in which all information to be relied upon to establish inadmissibility was possessed by the party making such claim and adduced in such proceeding prior to such enactment." (Emphasis added.)

This section makes obvious direct reference to the possible inadmissibility of evidence seized pursuant to a wire tap in a grand jury proceeding. If such a claim of an inadmissibility could not be raised by a witness, the inclusion of "grand jury" in paragraph (a) would be totally devoid of meaning. Moreover, the section refers to a "proceeding in or before any . . . grand jury . . . ," thus indicating that the breadth of the word "proceeding" in 18 U.S.C. § 2518(9), (10) includes a grand jury. If there should be any lingering doubt on this point, subsection (b) specifically defines "unlawful act" as " . . . the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) . . . ," thereby including all devices regulated pursuant to the wire tap statute. Section 3504 allows the claim of admissibility to be raised by any "aggrieved party." Subsection (a)(1). Also, the section provides for disclosure of evidence " . . . relevant to a pending claim of such inadmissibility." From the above, it is quite apparent that Congress intended to allow claims of inadmissibility of evidence to be raised by a grand jury witness. The section goes further than allowing merely of invocation of privilege not to

testify[3]; it provides for "inadmissibility," or, in other words, suppression of evidence. The section further requires an affirmance or denial by the opponent of the claim, thereby either forcing the evidence to be immediately suppressed upon the admission of the illegal act or putting the issue squarely in contention. Resolution of this question can logically only take place in an adversary hearing (the precise remedy petitioner argues is constitutionally mandated). The only remaining questions deal with the scope and type of inquiry in such a hearing.[4]

D. What kind of hearing should be allowed?

A hearing of the kind sought by petitioner presents several issues with regard to the scope of the inquiry to be allowed at such a hearing and the burden of proof upon the moving party. There are various indications that perhaps the proper standard for the burden of proof (to be placed on the government to justify the legality of the seized evidence) should be "beyond a reasonable doubt." For instance, in *Miranda v. Arizona* (1966), 384 U.S. 436, this Court determined that there was a "heavy burden" upon the government to establish a waiver of constitutional rights. Also, under *Chapman v. California* (1967) 386 U.S.

3. See footnote 2, *supra*, pp. 10, 11.

4. Finally, it must be noted that a serious question is presented in the instant case as to whether the wire tap statute is unconstitutional with regard to petitioner Gelbard, in that, apparently, petitioner was the victim of a wire tap which was not directed against him but which was subsequently used as the basis of attaining a wire tap specifically aimed at petitioner. There is a serious problem whether evidence obtained as a result of the first wire tap, and for which obviously there was no probable cause with regard to petitioner, can be utilized in itself or as a basis for obtaining further evidence. For, the initial seizure of evidence in that first wire tap was not based on any probable cause with respect to petitioner.

18, error is harmless only when it can be shown, beyond a reasonable doubt, that it had no impact on the verdict. Apparently, however, this Court has recently ruled that at least in the area of a pretrial determination on the voluntariness of a confession, the burden of proof of "beyond a reasonable doubt" would not be imposed on the prosecution. *Lego v. Twomey* (Dec. 1971 — 70-5037). However, aside from the decision in that case, petitioner feels that the arguments in relation to the need to protect the judiciary from engaging or condoning illegal police practices necessitates that a very strict burden be imposed upon the government to justify the search in a particular case. As is noted in the dissent by Justice Brennan in the *Lego* case, the fact finder's resolution (of conflicting testimony) at such a hearing is " . . . as a practical matter, the final resolution of the . . . issue." It would seem, therefore, that the absolute need of the judiciary to exercise its supervisory powers to prevent constitutional intrusions, and to follow the dictates of *In re Winship* (1970), 397 U.S. 358, demand that the burden imposed on the government at such hearing be "beyond a reasonable doubt."

Various other issues remain with regard to the *scope* of the inquiry to be allowed. For example, the problem remains as to how far the moving party may go to question the validity of the warrant in question. Thus, it must be determined whether the moving party will be able to attack the affidavit in support of the warrant, or, whether the affidavit and warrant must be judged on their face. See: *Giordenello v. United States* (1958), 357 U.S. 480.

Petitioner maintains that the extreme necessity for protection of constitutional rights and the solicitude

which has thus far been shown in the area of the Fourth Amendment (see *Koufman v. United States, supra*) demands that the scope of the hearing be enlarged sufficiently in order to insure protection of these rights.

CONCLUSION

For the reasons cited above, petitioner requests that an order issue returning proceedings in the instant case to the District Court for hearing on the issue asserted in petitioner's claim in refusing to answer questions posed by the grand jury; or, in the alternative, that on the basis of the unconstitutionality of the federal wire tap statutes of 18 U.S.C. § 2510, *et seq.*, an order issue quashing the subpoenas issued for petitioners in the instant case, and that the order of contempt be vacated.

Respectfully submitted,

BURTON MARKS

Attorney for Petitioner
David Gelbard

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 322 Main Street, Huntington Beach, California 92648, that on JANUARY 27th 1972, I served the within BRIEF FOR PETITIONER GELBARD (No. 71-110), on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA
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LOS ANGELES, CALIFORNIA 90012 (2 copies)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY 27th 1972, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

FILE COPY

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

No. 71-110

In the Supreme Court of the United States

OCTOBER TERM, 1971

DAVID GELBARD AND SIDNEY PARNAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 433 F. 2d 837.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1971. A petition for rehearing was denied on June 23, 1971. The petition for a writ of certiorari was filed on July 22, 1971, and certiorari was granted on December 14, 1971. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, or the Organized Crime Control Act of 1970, 18 U.S.C. 3504, altered the rule that a witness before a grand jury has no standing to question the source of the government's evidence, by permitting a witness to refuse to answer questions on the basis of the witness' allegation that the grand jury's subpoena or questions propounded before the grand jury are the result of illegal electronic surveillance.

STATUTES INVOLVED

The pertinent provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, and the Organized Crime Control Act of 1970, 18 U.S.C. 3504, are set forth in an Appendix to our brief filed in *United States* v. *Egan*, No. 71-263, October Term, 1971, at pp. 31-34.

STATEMENT

This case arises from judgments of civil contempt entered pursuant to 28 U.S.C. 1826 against petitioners by the United States District Court for the Central District of California. The civil contempts were based on petitioners' refusals to answer questions before a federal grand jury solely on the ground that their subpoenas and the grand jury's questions were based upon allegedly illegal electronic surveillance.

During a court-authorized monitoring of the telephone of one Perry Paul,[1] conversations between Paul and petitioner Gelbard relating to the placement of wagers were overheard. Similarly, during a court-authorized monitoring of the telephone of one Jerome Zarowitz,[2] conversations between Zarowitz and petitioner Parnas were overheard respecting bookkeeping procedures relating to gambling proceeds.

Petitioners Gelbard and Parnas were subpoenaed to appear before a federal grand jury. Both moved to suppress any evidence obtained pursuant to the court-authorized electronic interceptions, to declare 18 U.S.C. 2518 unconstitutional and to stay their appearance before the grand jury until these matters were resolved (A. 19–27, 47–48, 58–84). At the hearing on the motions the government acknowledged that questions to be asked of petitioners would be based upon their intercepted conversations (A. 43, 63). The government further stated that neither petitioner was contemplated as a defendant in any possible resulting indictment, but rather had been summoned to testify concerning their knowledge of others: petitioner Parnas' testimony was sought with respect to Zaro-

[1] The order of interception was entered on October 22, 1970, pursuant to 18 U.S.C. 2518. The interception commenced on October 23, 1970, and terminated on November 6, 1970. The interception related to an investigation by the F.B.I. into violations of 18 U.S.C. 371, 1084 and 1952.

[2] The order of interception was entered on November 17, 1970. The interception commenced on November 18, 1970 and terminated on December 12, 1970.

witz; petitioner Gelbard's with respect to one Gerald Kilgore.[3] The district court denied the motions (A. 43, 86–88).

Both petitioners appeared before the grand jury but refused to answer questions based upon the intercepted conversations until they had been given copies of the wiretap applications and orders and transcripts of the intercepted conversations (A. 89–103). Neither petitioner asserted the privilege against self-incrimination.

Following a hearing, the district court held petitioners in civil contempt and committed them until they answered questions, or for the life of the grand jury.[4] The court of apeals affirmed, stating that it "appears to be settled that a witness in a grand jury proceeding has no right to resort to a court to secure authoritative advance determination concerning evidentiary matters that arise, or may arise, or to exclude evidence to be used in such a proceeding" (Pet. App. 2; 443 F. 2d 837, 838). The court noted that nothing in the wiretaping provisions of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510, including specifically 18 U.S.C. 2518(10)(a), changed this general rule.

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[3] Both Kilgore and Zarowitz were then defendants in indictments pending in the Central District of California; however, the government represented that the matters as to which the petitioners' testimony was sought were not related to the pending cases.

[4] The commitment of the petitioners has been stayed successively by the district court, the court of appeals and Mr. Justice Douglas.

SUMMARY OF ARGUMENT

I

The government's response to petitioners' principal contention—that grand jury witnesses may refuse to answer questions upon their allegation that their subpoenas and questions asked them are based upon allegedly illegal electronic surveillance—is fully set forth in the government's brief in *United States* v. *Egan* (No. 71-263, October Term, 1971), upon which we here rely. We there suggest that the right asserted by petitioners would entail a novel extension of the exclusionary rule of the Fourth Amendment. Traditionally the exclusionary rule has been invoked to prohibit the introduction against the victim of an illegal search of any evidence so obtained. The rule urged by the petitioners would permit the victim of such a search to suppress the use of evidence so obtained against third persons.

Historically grand jury witnesses have not been permitted to challenge the source or kind of the government's evidence. Congress should not be deemed to have changed these settled principles in the absence of a clear intention to do so. The statutes relied upon evidence no such intention.

II

Petitioners principally rely upon the provisions of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* As our brief in *Egan* indicates, the language of the statute and its legislative

history show no congressional intent to permit grand jury witnesses to refuse to testify until the government proves the validity of its evidence. We here add the observation that the use in Section 2518(10)(a) of the term "aggrieved person" was not intended to confer standing to move to suppress upon any person allegedly illegally overheard, but rather to incorporate into the Act the body of law surrounding the use of the same term in Rule 41(e), Fed.R.Crim.P. (*Alderman* v. *United States*, 394 U.S. 165). The term "aggrieved person" should not be construed as petitioners would have it, since Rule 41(e) plainly does not confer upon any victim of an allegedly illegal search the right at trial to suppress the use of such evidence against third parties.

In this brief we consider petitioner Gelbard's special reliance upon Title VII of the Organized Crime Control Act of 1970, 18 U.S.C. 3504. In Section 3504 Congress modified the rule in the *Alderman* case, *supra*, by limiting both the conditions for disclosure and the occasions when disclosure might be required at all. The legislative history clearly shows that Congress had no intention in enacting that section to create new remedies for persons allegedly illegally overheard. Moreover, since Section 3504 applies only to electronic surveillance occurring prior to the enactment of the wiretapping provisions of the 1968 Act, it does not apply to the wiretaps in this case and cannot be construed in any way to modify the provisions of the 1968 Act.

ARGUMENT

I

GRAND JURY WITNESSES HAVE NOT BEEN PERMITTED TO CHALLENGE THE EVIDENCE THAT LED THE GRAND JURY TO CALL THEM OR WHICH PROVIDED THE BASIS FOR QUESTIONS ASKED THEM

Our response to petitioners' basic contention that a witness may refuse to answer questions before a grand jury upon his allegation that the subpoenas to appear and the questions asked are based upon allegedly illegal electronic surveillance is fully set forth in our brief in *United States* v. *Egan*, No. 71–263, October Term, 1971, upon which we primarily rely. Factual differences in the cases and arguments stressed by counsel call for a few additional observations on the constitutional issue (Point I) and construction of the statutes relied upon (Point II).

Unlike *Egan*, neither petitioner here invoked his privilege against self-incrimination as grounds for refusing to testify,[5] and hence neither has received a grant of immunity.[6]

The petitioners are not seeking to prevent the use against themselves of their testimony in response to questions based upon the intercepted communications. Rather they seek to block the use of that evidence

[5] Should petitioners be unsuccessful before this Court, a claim of the privilege may subsequently be advanced.

[6] Authorization to seek a grant of immunity with respect to petitioner Parnas has been obtained.

against others—in this instance, Kilgore and Zarowitz, acknowledged targets of the investigation.[7]

As we indicate in our brief in *Egan* (pp. 7–12), the exclusionary rule of the Fourth Amendment has never been construed to accord witnesses the right to seek the suppression of the use against third parties of evidence allegedly illegally seized from such witnesses. Rather the exclusionary rule may be invoked only by one (1) who was the subject of an illegal search and (2) against whom the evidence obtained by the search is sought to be introduced.

A contrary rule would intolerably burden the criminal process. If the Fourth Amendment permits a grand jury witness to exclude evidence seized from him but intended for use against a third party, a witness at trial may exercise the same right. In *Alderman* v. *United States,* 394 U.S. 165, where the claim was made that if any evidence used to convict any of the defendants was illegally seized from any one of them, then reversal of all of their convictions was required, this Court observed:

> There is no necessity to exclude evidence against one defendant in order to protect the

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[7] Apart from the government's representation that petitioners were not potential defendants, petitioners' failure to assert the privilege against self-incrimination is strong evidence that petitioners are more concerned with the possible use of their testimony against others than against themselves.

As we note in our brief in *Egan* (pp. 10–11), even if petitioners had been targets of the investigation, their proper remedy—aside from their unquestioned right to assert the privilege against self-incrimination—would not be a refusal to testify in the grand jury, but a motion to suppress at trial, *Blue* v. *United States*, 384 U.S. 251.

> rights of another. *No rights of the victim of an illegal search are at stake when the evidence is offered against some other party.* The victim can and very probably will object for himself when and if it becomes important for him to do so [at 174; emphasis supplied].

Here, also, no rights of petitioners would be at stake, even if the court order were technically deficient, since their testimony is sought for use against others. As we point out in our brief in *Egan* (pp. 11–12), the rule urged by petitioners would also seem to permit a non-defendant witness in a criminal trial to move to exclude evidence allegedly unlawfully seized from him that is sought to be introduced against the defendant. The consequence of that rule would be extensive interruption and delay of proceedings at both the grand jury and trial levels in order to accommodate third party claims unrelated to the primary object of the proceeding. Such a rule would "increase to an intolerable degree interference with the public interest in having the guilty brought to book," *Blue* v. *United States,* 384 U.S. 251, 255.

As we note in our brief in *Egan* (pp. 12–18), the current rule, which denies a witness the right to seek suppression of evidence against others, has particular force in the context of grand jury proceedings. The grand jury has "a right to every man's evidence" (*Piemonte* v. *United States,* 367 U.S. 556, 559, n. 2). Regardless of the reasons for their subpoenas, the evidence sought from petitioners is the kind of non-privileged, non-confidential evidence every citizen is

obligated to provide (See *Blair* v. *United States*, 250 U.S. 273). Noting the grand jury's role as "a great historic instrument of lay inquiry into criminal wrongdoing" (*United States* v. *Johnson*, 319 U.S. 503, 512), courts have traditionally refused to allow challenges—including challenges as to the source of its evidence—to divert the grand jury from its business (see generally *Egan* brief pp. 12–18 and *Blair* v. *United States*, *supra*; *Blue* v. *United States*, *supra*).

II

NEITHER THE OMNIBUS CRIME CONTROL ACT OF 1968, 18 U.S.C. 2510, ET. SEQ., NOR THE ORGANIZED CRIME CONTROL ACT OF 1970, 18 U.S.C. 3504, ALTERS THE RULE THAT GRAND JURY WITNESSES CANNOT CHALLENGE THE SOURCE OF THE GRAND JURY'S EVIDENCE

Our principal arguments with respect to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, are set forth in our brief in *Egan*. While we add a few observations concerning that Act, our principal purpose here is to explore petitioner Gelbard's special reliance on Title VII of the Organized Crime Control Act of 1970, 18 U.S.C. 3504.

1. As we point out in our brief in *Egan* (pp. 18–25), the legislative history of 18 U.S.C. 2510, *et seq.* shows clearly that Congress intended no extension of the exclusionary rule nor any alteration of the rules governing standing to move to suppress. In our view, the term "aggrieved person," as employed in Section 2518(10)(a), was used simply as a convenient and

familiar term of description, as with Rule 41(e), Fed. R.Crim.P., intended to be coextensive with the rules which presently govern standing to suppress the products of an unlawful search and seizure (*Alderman* v. *United States,* 394 U.S. 165, 175–176, n. 9). Were it otherwise, then presumably the general language of Rule 41(e) would similarly confer standing upon "person[s] aggrieved" to move to suppress, at least at trial, the use against third parties of evidence obtained in violation of the Fourth Amendment. Moreover, since Section 2518(10)(a) clearly applies to trials, a witness, or even one not a witness[8] could suppress evidence for use against other parties.

Thus, while we believe the omission of grand jury proceedings from Section 2518(10)(a) was clearly

[8] We have already pointed out that under the construction of 18 U.S.C. 2518(10)(a) urged by petitioners, the victim of a search and seizure—even if he is a non-defendant witness—could, as an "aggrieved person," move to suppress competent and material evidence offered at trial against other parties. The same result would follow under Rule 41(e) for a non-defendant witness, as a "person aggrieved." But this is not the limit of the construction since there is no reason, given the import attributed by petitioners to "aggrieved person," to limit the availability of the motion to suppress to witnesses and defendants. Thus, under the facts present in *Wong Sun* v. *United States,* 371 U.S. 471, where narcotics seized from a third party were held inadmissible against one defendant because it was the product of statements made by him at the time of arrest, but were admissible against the co-defendant because the seizure invaded no rights of his, the third party presumably would be able to move to suppress the evidence against the co-defendant.

deliberate,[9] that omission is not necessary for the position we advance. As stated, the consequences which flow from the construction of Section 2518(10)(a) urged by petitioners are equally serious with respect to trial proceedings, to which the statute is clearly applicable. Had Congress intended to effect such a drastic change in the exclusionary rule as permitting the victims of unlawful searches and seizures to exclude evidence against other parties, it would have done so in clear terms.

2. Petitioner Gelbard argues, independent of any claim with respect to 18 U.S.C. 2515 and 2518(10)(a), that Title VII of the Organized Crime Control Act of 1970, 18 U.S.C. 3504, establishes that a witness before a grand jury may challenge the legality of an alleged overhearing upon the witness' allegation that an unlawful interception of his communications has occurred. Neither the express language of the statute nor its legislative history support the conclusion that Section 3504 creates such a statutory privilege.

Section 3504 was the Congressional response to this Court's decision in *Alderman* v. *United States*, 394

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[9] We do not believe that the consequences of omission of grand juries from the list in Section 2518(10)(a) of proceedings in which suppression motions may be made are changed by the fact that proceedings to hold recalcitrant grand jury witnesses in contempt occur before a court, which is included in the list. In the first place Section 2518(10)(a) deals with suppression of allegedly illegally seized evidence, and, in contempt proceedings, no such evidence is sought to be introduced before the court. Moreover, since all claims of a right not to testify before a grand jury must be passed upon by a court, such a reading of Section 2518(10)(a) would be inconsistent with the deliberate omission of grand juries.

U.S. 165. S. Rpt. No. 617, 91st Cong., 1st Sess., (Sen. Rep.) pp. 64–70.[10] H. Rep. No. 1549, 91st Cong., 2d Sess. (House Rep.) pp. 51, 81–83. Section 3504 modified, with respect to interceptions occurring prior to the passage of Title III of the Omnibus Crime Control Act, the requirement enunciated in *Alderman* of automatic disclosure of the contents of intercepted communications to a defendant with standing to suppress the use of such conversations as evidence. Sen. Rep., pp. 62–70.

This the Congress sought to accomplish in two ways. First, Section 3504(a)(2) provides for disclosure, for a determination of admissibility, of overheard conversations intercepted prior to June 19, 1968, only where the information "may be relevant" to a claim of inadmissibility. It permits the *in camera* inspection of the contents of the conversations to determine whether or not the information contained therein may be relevant. Sen. Rep., pp. 65, 67–68, 152–154, and House Rep., p. 51.

Second, Section 3504(a)(3), in effect, establishes a statute of limitations upon claims that evidence of an event derived from the exploitation of an unlawful overhearing. Sen. Rep., 68; House Rep., 52, 80–82. It provides that no claim that evidence of an event is inadmissible on the grounds that evidence was obtained by the exploitation of an unlawful overhearing occurring prior to June 19, 1968 (the date of the

[10] While the original Senate Bill applied to all motions to suppress, it is clear that the primary concern related to the disclosure of unlawfully intercepted communications required under this Court's decision in *Alderman*. Sen. Rep., pp. 64–70.

enactment of 18 U.S.C. 2510, *et seq.*) shall be considered where the unlawful overhearing occurred more than five years *prior* to the event sought to be proved by the evidence. Section 3504(a)(3) thus amounts to a presumption of law that "no evidence of an event can be found tainted by an alleged illegality antedating the event by such a prolonged period of time," House Rep., p. 52, and see, pp. 50–51. See also, Sen. Rep., pp. 68–70, 153.

The Congressional purposes advanced in Section 3504 are contrary to petitioner Gelbard's contention that the statute creates a statutory privilege which may be invoked by witnesses. As stated in the Senate Report, the dual purposes of the statute are:

> (1) to protect legal proceedings against delay, congestion, expense and distraction caused by the unlimited and unrestrained litigation of tenuous allegations that evidence should be suppressed; and (2) to prevent harm to legitimate public and private interests caused by forced disclosure of confidential files clearly unrelated to pending litigation [Sen. Rep., p. 63].

The Report continually reflects concern over the burden upon judicial time and the consequent delay in the handling of criminal cases occasioned by motions to suppress the fruits of unlawful interceptions of communications. Section 3504 was aimed at minimizing the burden on judicial time to the extent consonant with a proper regard for the rights of a *defendant*. Sen. Rep., pp. 63–70, 152–153. It is unreason-

able to suppose that Congress, in striving to reduce the amount of litigation arising from claims of unlawful interception, would at the same time create a new statutory privilege enabling a witness before a grand jury, or at trial, to contest the legality of interceptions before being obligated to testify.

In fact "* * * nothing in section 3504(a)(1) is intended to codify or change present law defining illegal conduct or prescribing requirements for standing to object to such conduct * * *" (Sen. Rep., p. 154). Earlier the same report notes that no "language in proposed section 3504 contain[s] an implication creating new grounds for disclosure or suppression or extending existing one to new forums" (Sen. Rep., p. 154). As with the use of the terminology "aggrieved person" in Section 2518(10)(a), Congress employed the term "party aggrieved" in Section 3504(a) as a convenient term to describe those who have been accorded standing to suppress as evidence the products of an unlawful search and seizure.

The legislative history of specific provisions of Section 3504 shows, if further support is necessary, that the statute did not envision a broadening of the category of those who have standing to suppress. In explaining Section 3504(a)(1), the House Report states:

> Under this provision, upon a charge by the *defendant with standing to challenge the alleged unlawful conduct,* the Government would be required to affirm or deny that an unlawful act involving electronic surveillance had in fact occurred [House Rep., p. 51; emphasis supplied].

Similarly, with respect to Section 3504(a)(2), it stated:

> Under paragraph (2) disclosure of the information shall be required to be made to *a defendant who has demonstrated* the illegality of the electronic surveillance (occurring prior to June 19, 1968) and *his standing* where such information is or "may be" relevant to a claim of inadmissibility [House Rep., p. 51; emphasis supplied].

It is equally clear from the Senate Report, which at all times refers to a "defendant," that use of the term "party aggrieved" conveys nothing more than the individual who under existing law has standing to suppress the products of an alleged unlawful interception of communications, Sen. Rep., pp. 62–70.

In any event, since the application of 18 U.S.C. 3504 is limited to interceptions occurring prior to the enactment, on June 19, 1968, of Title III of the Omnibus Crime Control Act, the statute cannot be invoked by petitioners[11] or construed as modifying the provisions of Title III.

Section 3504(a)(2) provides for the procedures applicable to disclosure only where the claim of inadmissibility relates to an unlawful electronic surveillance which occurred prior to June 19, 1968. Similarly, subparagraph (3) establishes a five-year limitation

[11] The intereceptions forming the basis of petitioners' claim occurred in 1970 and were obtained pursuant to the provisions of 18 U.S.C. 2518.

solely with respect to claims that the alleged inadmissible evidence was obtained by the exploitation of an unlawful overhearing which occurred prior to June 19, 1968. Thus, the express language of the statute indicates it is addressed to the problems of unlawful interception occurring prior to the passage of Title III of the Omnibus Crime Control Act, and Section 3504(a)(1) should be read in conjunction with the other subsections to be limited to surveillence before June 19, 1968. This view is reinforced by the legislative history of the statute.

Although the original Senate Bill (S. 30, Sen. Rep., pp. 15–16) applied to motions to suppress generally (Sen. Rep., pp. 62–70),[12] the bill was amended by the House of Representatives, and it was this revised version which was passed by Congress. House Rep., pp. 11–12. The bill in its final form restricted the scope of the original Senate bill by limiting Section 3504 to motions to suppress predicated upon a claim of (1) unlawful electronic surveillance (2) occurring prior to June 19, 1968.

In explaining to his colleagues the scope of Section 3504, Senator McClellan observed:

> [I]t is limited to surveillance that occurred prior to June 1968. * * * Electronic surveillance

[12] As observed in note 10, *supra*, while the original Senate Bill applied generally to motion to suppress, a primary objective of the bill was to modify the procedural requirements enunciated in *Alderman*.

> subsequent to that time is controlled by the 1968 act, where the disclosure requirement is the same as it was set out in title II. See Senate Report No. 1097, 90th Congress, second session at 106 (1968). When the Senate passed title VII, it was not limited to electronic surveillance, so, it was necessary to make it apply to acts occurring after 1968. This new language applies, however, only to surveillance prior to 1968. [116 Cong. Rec., 91st Cong., 2d Sess., No. 179, p. S17775 (October 12, 1970)]

See also the remarks of Congressman Celler, 116 Cong. Rec., 91st Cong., 2d Sess., No. 175, p. H9653 (October 6, 1970).

Moreover, with respect to Section 701 of Public Law 91–452, containing the Congressional Statement of Findings with respect to Section 3504, the House Report observes:

> This section contains a special finding relating *as do the following sections of the title* [Section 3504 in its entirety], to certain evidentiary problems created by electronic surveillance conducted by the Government prior to the enactment of Public Law 90–351 on June 19, 1968, which provided statutory authority for obtaining surveillance warrants in certain types of criminal investigations (18 U.S.C. 2516) * * * [at 501; emphasis supplied].

Because the statute is intended solely to establish procedures governing motions to suppress the contents or fruit of intercepted communications occurring prior to

the enactment of 18 U.S.C. 2510, *et seq.*, the section is inapplicable here.[13]

[13] The only language which could support a view that Section 3504 somehow modified Title III of the 1968 Act is the following from the Senate Report:

> The language used in defining the types of proceedings, types of forums, and jurisdiction in which section 3504 is applicable was taken from 18 U.S.C. § 2515. The only exception is that section 3506 [*sic*] omits legislative committees * * * [w]here a conflict between section 3504 and and another provision dealing with disclosure is presented or is alleged to exist, the provisions of section 3504 are intended to control. See, e.g., 18 U.S.C. § 2518(10)(a), § 3500 [Sen. Rep., p. 154].

However the Report related to Title VII of the original Senate Bill (S. 30). After the House amendment (adopted by the Senate) limiting Section 3504 to electronic surveillance occurring before the effective date of Title III, there is no possibility of any overlap of Title III of the 1968 Act and Title VII of the 1970 Act, let alone a "conflict". For this reason, the above reference in the Senate Report to a possible conflict between Section 3504 and Section 2518(10)(a) is of questionable significance. Moreover, had Congress intended that Section 3504 in effect amend Section 2518(10)(a) to include grand jury proceedings, it is probable that it would have done so by formal amendment. Indeed, Public Law 91-452, the Organized Crime Control Act of 1970, did amend certain provisions of Title III of the Omnibus Crime Control Act of 1968. See 18 U.S.C. 2516(1)(c), and Section 2517(3). In any event, it is more likely that the conflict noted in the Senate Report refers to the fact that Section 3504(a)(3), establishing the five-year statute of limitations with respect to claims that evidence derives from the exploitation of an unlawful act, limited the disclosure provision of 18 U.S.C. 2518(10)(a) by placing a restriction upon the court's discretion to disclose intercepted communications once a motion to suppress is made.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-110

DAVID GELBARD and SIDNEY PARNAS,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
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No. 71-263

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOQUES EGAN,

Respondent.

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UNITED STATES OF AMERICA,

Respondent.

No. 71-263

UNITED STATES OF AMERICA,

Petitioner,

—v.—

JOQUES EGAN,

Respondent.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide nonpartisan organization of over 170,000 members dedicated

* Letters of consent from the Government and from counsel for Petitioners Gelbard and Parnas and Respondent Egan to the filing of this brief have been filed with the Clerk.

solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-one year existence the ACLU has been concerned particularly with devices used by the Government to invade the privacy of citizens. ACLU policy stands unequivocally opposed to electronic surveillance by any person or agency for any reason whatever. The ACLU also opposes the admission of illegally obtained evidence in any legal proceeding.

In the context of grand jury proceedings the ACLU believes that witnesses should have full procedural protection when questioned by a grand jury, including standing to allege invasion of their constitutional rights by the Government. The ACLU does not believe that a grant of immunity, however broad, is sufficient to protect a witness' constitutional rights. All these issues are involved in these cases.

Statement of the Cases

These cases involve the meaning of the Omnibus Crime Control and Safe Streets Act of 1968, Sections 2510 *et seq.*, which regulates electronic surveillance by the Federal Government.

The facts in both cases are essentially similar. Petitioners in *Gelbard* and Respondent in *Egan* were subpoenaed to appear before grand juries investigating various criminal offenses. Petitioners in *Gelbard* alleged that certain questions put to them were based on information obtained by the Government by illegal wiretapping. Respondent in *Egan* alleged that her subpoena and the questions put to her were based on information gained

by the Government by illegal wiretapping and electronic surveillance.

Petitioners' claim in *Gelbard* was rejected by the United States District Court for the Central District of California and, on appeal, by the Ninth Circuit Court of Appeals on the ground that Petitioners did not have standing to make such a claim. Respondent's claim in *Egan* was accepted by the Third Circuit Court of Appeals sitting *en banc*, which specifically held that a witness before a grand jury has standing to challenge the illegal basis of his subpoena and the questions put to him where it is claimed that they are based on information obtained as a result of illegal electronic surveillance.

ARGUMENT

I.

A witness before a grand jury has a constitutional right to refuse to answer questions propounded to him when the basis for the questions is electronic surveillance of him conducted by the Government in violation of the Fourth Amendment.

The Government claims that an individual subpoenaed to appear before a grand jury as a result of illegal electronic surveillance has no standing to challenge the subpoena or questions based on the illegally obtained evidence. *Brief for the United States* at 5. "That argument is not persuasive for it appears to be founded on the premise that the grand jury may . . . compel production of evidence in violation of the Fourth Amendment," *In re Dionisio*, 442 F.2d 276, 279-80 (7th Cir. 1971). But as this Court has said: "Nothing can destroy a Government more quickly

than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio,* 367 U.S. 643, 659 (1961).

This Court has held that the Government cannot make use in a criminal trial of illegally seized material, or the fruits of that seizure. *Weeks* v. *United States,* 232 U.S. 383 (1914); *Mapp* v. *Ohio,* 367 U.S. 643 (1961). At least part of the rationale for prohibiting the use of illegally seized material is based on the unwillingness of this Court to allow the judiciary to take any part in the illegal venture. *Olmstead* v. *United States,* 277 U.S. 438, 471, 485 (1928) (Brandeis, J., dissenting); *id.* at 469-70 (Holmes, J., dissenting). The Federal grand jury as an arm of the judiciary should not be exempt from the policy. The grand jury is a *creature* of the federal courts. It is convened by them, and depends on them to enforce its orders. To allow the federal government to use illegal evidence before a grand jury will thus tarnish the reputation of the court system and thwart this Court's efforts to restrain illegal action on the part of the police.

A. *These Witnesses Have Constitutional Standing*

The fourth amendment to the United States Constitution prohibits unreasonable searches and seizures. Initially the fourth amendment was held to apply only to tangible property such as buildings, rooms, cars, desks and envelopes. In fact, a physical trespass was required to violate the amendment (*Olmstead* v. *United States,* 277 U.S. 438 (1928)), but the application of the trespass requirement resulted in strained analysis (*Silverman* v. *United States,* 365 U.S. 505 (1961)).

Consequently, this Court in *Katz* v. *United States,* 389 U.S. 347 (1967) discarded the notion that a search required a physical penetration of a private protected area, and held that the fourth amendment protects people not places, and conversations as well as tangibles. And it is now clear that electronic surveillance is a "search and seizure" within the ambit of the fourth amendment. *Id.* at 353.

In addition to its substantive holding, *Katz* also relaxed the requirements for standing to suppress evidence. As the Court held in *Alderman* v. *United States,* 394 U.S. 165 (1969), one has standing with regard to conversations in which he participated. In his separate opinion, Mr. Justice Harlan elaborated by saying: "Standing should be granted to every person who participates in a conversation he legitimately expects will remain private—for it is such persons that Katz protects." 394 U.S. at 191 (concurring in part and dissenting in part).

The parties in these cases fall squarely within the rule of standing laid down in *Alderman.* In *Egan,* respondent claims that her own phone was tapped illegally. In *Gelbard* and *Parnas,* petitioners claim that the phones of third parties were tapped illegally. In both cases, however, the parties claim that *their own conversations* were overheard and recorded—conversations which they had a right to consider confidential. They are clearly "victim[s] of an invasion of privacy." *Jones* v. *United States,* 362 U.S. 257, 261 (1960), and are entitled to protection of the fourth amendment. See *Alderman* v. *United States,* 394 U.S. at 176. The invasion of their constitutional rights makes clear that they have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court

so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

Such a witness has clearly suffered immediate and serious harm. He is entitled to challenge the illegal basis of his subpoena or questioning, because no other effective means can be devised to guarantee the full range of his essential constitutional rights. Reliance upon the application of the exclusionary rule at a future criminal trial to vindicate one's constitutional rights is quite insufficient. Delay in the vindication of the constitutional rights might well take months or even years. And in many cases no criminal proceedings will be brought, and the Government will thus be able to act illegally with impunity.

Further, delay chills the first amendment rights of the witness and his associates. *United States* v. *Rumely*, 345 U.S. 41 (1953); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Shelton* v. *Tucker*, 364 U.S. 479, 486 (1960) (Stewart, J.); *Konigsberg* v. *State Bar*, 366 U.S. 36 at 73-74 (1961) (Black, J., dissenting). On the relationship between the first and fourth amendments, see especially *Stanford* v. *Texas*, 379 U.S. 476 (1965). In the context of secret grand jury proceedings, being compelled to testify drives a "wedge of mistrust" between them. *Caldwell* v. *United States*, 434 F.2d 1081, 1084 (9th Cir. 1970), *cert. granted*, 402 U.S. 942 (1971). It also may expose the witness to considerable public obloquy.

Surely these threats to fragile constitutional rights should not be tolerated. The constitutional issue is ripe for adjudication at the time the witness is called before the grand jury.

This analysis is in no way affected by grants of immunity to grand jury witnesses. The fifth amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." Its prohibition is absolute and protects a witness from the risk of *prosecution*, it acts as a "safeguard of conscience and human dignity and freedom of expression," and protects him from all compulsory testimony "which would expose him to infamy and disgrace." *Brown* v. *Walker*, 161 U.S. 591, 631 (1895) (Field, J., dissenting). See generally *Ullman* v. *United States*, 350 U.S. 422, 443-455 (1956) (Douglas, J., dissenting). No grant of immunity can adequately protect the infringement of fourth amendment rights involved in these cases, especially in light of the resultant effect on critical first amendment rights.

It is now well settled that the fourth amendment is applicable to the grand jury process. In *Hale* v. *Henkel*, 201 U.S. 43 (1906), this Court held that a grand jury subpoena for the production of books and papers constituted an unreasonable search and seizure. Since *Hale* v. *Henkel*, courts have struck down grand jury subpoenas which were unreasonable under the fourth amendment. *Schwimmer* v. *United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); see *Application of Linen Supply Cos.*, 15 F.R.D. 115 (S.D.N.Y. 1953). But the fourth amendment is not limited only to overbroad grand jury subpoenas calling for documentary evidence. It has been applied in other situations. *In re Dionisio*, 442 F.2d 276 (7th Cir. 1971) (furnishing of handwriting exemplars); *Mara* v. *United States*, No. 71-GJ-460 (7th Cir. Dec. 1, 1971) (same).

The Government's description of *Blair* v. *United States,* 250 U.S. 273 (1918), is grossly misleading. The Government contends that *Blair* holds that witnesses before a grand jury cannot challenge under the first amendment the validity of the statutes the violations of which the grand jury was investigating. But the first amendment is not even mentioned in the opinion of the Court. The case actually involved a claim that the Federal Corrupt Practices Act was unconstitutional under Article I, Section 4 of the United States Constitution.

Thus the cases now before the Court are quite different from the *Blair* case. First, like Mrs. Frothingham of *Frothingham* v. *Mellon;* 262 U.S. 447 (1923), Blair contended that a federal statute was beyond congressional power. Of course the Court ruled that he lacked standing. Accord, *Frothingham* v. *Mellon, supra;* see *Flast* v. *Cohen,* 392 U.S. 83 (1968). On the other hand, the witnesses in *Egan* and *Gelbard,* like the plaintiffs in *Flast* v. *Cohen, supra,* contend that the government's action breaches express limitations on government power, namely the first and fourth amendments. Applying the test articulated in *Flast* and elsewhere, they clearly have constitutional standing to assert this claim.

Second, in the instant cases, unlike in *Blair,* there is no challenge to the jurisdiction of the grand jury or to the validity of the statutes the violations of which were being investigated. The witnesses in these cases seek only to challenge the illegal basis of their own subpoenas and the questions put to them on fourth amendment grounds as ramified by the first amendment. Cf. *Caldwell* v. *United States,* 434 F.2d 1081 (9th Cir. 1970), *cert. granted,* 402 U.S. 942 (1971).

Third, the constitutionality of criminal statutes is not to be resolved in advance of necessity. E.g., *United States* v. *United Automobile Workers Union*, 352 U.S. 567 (1957). Orderly adjudication requires that such decisions be made only after full evidentiary proceedings in which the factual context of the statute's application is elaborated. *United States* v. *United Automobile Workers Union, supra.* That is the point of *Blair.* To be contrasted are situations like the present ones. The factual issues can easily be resolved without a full criminal trial. The constitutional claim is that the government has acted unlawfully from beginning to end, to such an extent that if it is permitted to continue, the courts themselves will be embroiled in the illegality. Cf. *Olmstead* v. *United States*, 277 U.S. 438 (1928).

B. *The Exclusionary Rule Requires That the Witnesses' Claims Be Upheld.*

In *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), Mr. Justice Holmes, delivering the opinion of the Court, said "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used [by the Government] at all." Consequently, the fourth amendment prevents the Government from using illegally seized evidence as the basis for questioning aggrieved parties before a grand jury. *Silverthorne* has recently been affirmed by this Court. *Harrison* v. *United States*, 392 U.S. 219, 222 (1968).

Unlawful wiretapping may jeopardize first amendment rights by inhibiting the free exchange of ideas, and because by nature it is hidden, see *Lopez* v. *United States*, 373 U.S. 427, 469-70 (1963) (Brennan, J., dissenting). It

is, therefore, even more offensive to a free society than the unlawful search and seizure of tangibles. See *Alderman* v. *United States*, 394 U.S. 165, 203 (1969) (Fortas, J.; concurring in part and dissenting in part).

Electronic surveillance is a great deal less "reasonable" than any other type of search because it is impossible to anticipate the exact contents of a bugged conversation; therefore, electronic surveillance always involves "general searches" clearly forbidden by the Fourth Amendment. When one person's telephone is tapped, anyone who communicates with that person is overheard. Indeed, the increasing use of electronic surveillance by government results in massive invasion of the privacy of tens of thousands of citizens but very few criminal convictions.

The reported statistics of wiretapping by federal and state government make this quite clear.* In 1969, court-reported federal wiretapping intercepted 44,940 conversations by 4,560 people. 36,840 of these conversations were said to be "incriminating," but they yielded only 139 arrests and 24 convictions. As of December 31, 1970, in 1970 court-reported federal wiretapping intercepted 147,780 conversations by 10,260 people. 102,780 of these conversations were said to be "incriminating," but they yielded only 613 arrests and 48 convictions. (*A Report on the Costs and Benefits of Electronic Surveillance* ii-iv (1971) by Professor Herman Schwartz of the Law School

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* TOTALS FOR 1968-70

Year	Orders	Installations	People	Conversations
1968	174	147	4,312	66,716
1969	302	271	31,436	173,711
1970	597	583	25,652	381,865

Source: H. Schwartz, *A Report . . . , infra* in text.

of the State University of New York at Buffalo.) Preliminary reports for 1971 indicate that the number of court-reported federal conversations intercepted has increased five-fold over 1970.

The reported figures are misleadingly low. First, they are based upon government self-reporting, which well may not be reliable. Second, they do not include the use of "bugs" as opposed to wiretaps. Third, they do not include wiretaps made where one party consents to his phone being tapped; and they do not include cases of "national security" wiretapping as to which the government claims a right to act without court supervision.

Even the government's own data indicate, however, that massive invasions of privacy are occurring, with very little direct gain for law enforcement. These invasions of privacy offend the fourth amendment and chill the exercise of first amendment rights of any citizen who has cause to fear that his or her phone is being tapped. Indeed, lower federal courts have noted in several cases that mere physical surveillance of protected activity by agents of some controlling authority is itself chilling enough to warrant judicial intervention. See *Furniture Workers Local 309* v. *Gates*, 75 F. Supp. 620 (N.D. Ind. 1948); *Bee See Books* v. *Leary*, 291 F. Supp. 622 (S.D.N.Y. 1968); cf. *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967). Intervention is even more urgently needed in the case of illegal wiretapping, which is so indiscriminate and insidious in its impact on first and fourth amendment rights. The danger to critical constitutional rights is so great that victims of illegal electronic surveillance should be able to invoke the exclusionary rule at the earliest possible occasion—when they are called as witnesses before a grand

jury—and thereby deny to the government the fruits of its lawless actions.

II.

The Omnibus Crime Control and Safe Streets Act of 1968 provides that a witness before a grand jury has standing to challenge his subpoena as well as questions which might be put to him on the ground that they are the result of illegal electronic surveillance.

Congress attempted to make wiretapping constitutional by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968. We think it did not succeed. See Schwartz; *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969). However, because Congress was sensitive to the constitutional considerations, it did endeavor to place stringent procedural safeguards on the power to wiretap. The Congressional findings set forth in Section 801 of the Act of 1968 explain that the purpose of Title III is *inter alia*, "to protect effectively the privacy of wire and oral communications" and "the integrity of court and administrative proceedings."* With these safeguards built into the

* "Section 801(b). In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings;

Section 801(d). To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent

Act, Congress assumed it to be constitutional. Suffice it to say that this constitutional issue need not be resolved in these cases, if the Court rules in favor of the grand jury witnesses who are now before it.

A. *The Statutes.*

18 U.S.C. Section 2515 provides:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

Section 2515 is an unequivocal bar to questioning a person before a grand jury if the questions are derived from electronic surveillance conducted in the absence of a properly issued warrant. The procedural mechanism for enforcing Section 2515 is found in Section 2518(10)(a) which provides in part that:

> "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision there-

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jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

of, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval."

Section 2510(11) defines "aggrieved person" for the purposes of the Omnibus Crime Control Act of 1968 as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

Judge Adams in *Egan* and Chief Judge Bazelon in *In re Carol Evans,* No. 71-1499 (D.C. Cir. July 23, 1971) held that Section 2518(10)(a) on its own grants a witness before a grand jury standing under the 1968 Act. On the other hand Judge Rosenn in *Egan* and Judge Wright in *Evans* have held that Section 2515 on its own grants a witness before a grand jury standing in such cases. These are both valid interpretations of the statute. The position taken by *Amicus* is that the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 *read either separately or together* grant such a witness standing.

Section 2515 specifically mentions a grand jury proceeding as one in which the fruits of illegal surveillance may not be used. The Senate Committee Report which accompanied the Act indicated the Committee's expectation that Section 2515 would be read in conjunction with Section

2518(10)(a),* but the Committee Report does no more here than restate the conventional maxim that a statute should be considered as a whole. It is not entitled to any greater weight.

While a grand jury hearing is not specifically mentioned in Section 2518(10)(a) as a proceeding to which the section applies, the section does not indicate that the listed proceedings are exclusively the ones for which the remedy is to be exercised. *In re Egan*, 450 F.2d 199, 203. Furthermore, a consistent reading of the statute as a whole clearly shows that Section 2518(10)(a) applies to a grand jury hearing. For example a motion to suppress under Section 2518(10)(a) may be made regarding the introduction of evidence obtained by illegal surveillance in "any . . . hearing, or proceeding in or before any court . . . or other authority of the United States." "Proceedings in court" encompasses many ancillary proceedings. See 34 Words and Phrases at 190-91 (Perm. ed.) and 1970 Pocket Part at 25-26.

The statute contains internal evidence that the word "proceeding" includes a grand jury proceeding. Section 2517(3) in authorizing disclosure of intercepted communications, speaks of "any *criminal* proceeding" and of "any . . . *grand jury* proceeding" (emphasis added). And Section 2515 encompasses "any . . . other proceeding in or

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* "The provision must, of course, be read in the light of Section 2518(10)(a) discussed below, which defines the class entitled to make the motion to suppress." S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U. S. Code, Cong. & Ad. News 2112, 2185 . . . . "This provision [Sec. 2518(10)(a)] must be read in connection with Sections 2515 and 2517 . . . which it limits." *Id.* at 2195. Because of the origin of the Act and the parliamentary procedure under which it was considered, there was no House Report on these relevant portions of the Act.

before any . . . grand jury." It is a basic rule of statutory interpretation that the same word should have the same meaning throughout the statute. See generally Thorne, *Construction of Statute,* in *How to Find the Law* at 353 (1949). Further, Rule 1 of the Federal Rules of Criminal Procedure defines "criminal proceeding" as inclusive of grand juries. Fed. R. Crim. P. Rule 6. Finally it should be noted that this Court has held that a grand jury is impanelled and proceeds under "the authority of the United States." *Hale* v. *Henkel,* 201 U.S. 43, 66 (1906); *Cobbledick* v. *United States,* 309 U.S. 323, 327 (1940). It is thus included in the class of proceedings to which Section 2518 (10)(a) is applicable.

This argument is reinforced by Section 702 of the Organized Crime Control Act of 1970, amending Title 18 by adding a new section, Section 3504, which lays down the procedure to be followed for litigation concerning sources of evidence, and thus clarifies §§2510 *et seq.* The term "grand jury" is explicitly used in §3504 and adds weight to the view advanced here that §2518(10)(a) applies to a grand jury hearing. Section 3504 provides:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
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> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulations or standard promulgated pursuant thereto.

The Senate Committee Report which accompanied the Act of 1968* implies a different interpretation from that

* "Because no person is a party as such to a grand jury proceeding [Sec. 2518(10)(a)], does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. (*Blue* v. *United States*, 384 U.S. 251 (1965).) There is no intent to change this general rule. It is the intent of this provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968), 1968 U. S. Code Cong. & Ad. News, 2112, 2195.

offered here. The Report suggests that grand jury witnesses do not have standing to move for the suppression of illegally obtained evidence. But, as demonstrated *supra*, the language of Section 2518 (10)(a) is quite clear when considered in the context of the statute. When the language of a statute is so clear and unequivocal a Congressional report is of little weight. *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

In any case, "[t]he legislative history is, to say the least, ambiguous." *In re Egan*, 450 F.2d 199, 206 (Adams, J.), as is it inconsistent with the authority cited by the Committee in its Report. *In re Egan*, 450 F.2d at 205-06. The Committee relies principally on *Blue* v. *United States*, 384 U.S. 251 (1965) as holding that a witness cannot question the character of evidence presented to a grand jury. But *Blue* v. *United States* is clearly inapposite, since it holds that if the government had submitted to a grand jury evidence obtained in violation of the Fifth Amendment, then by itself such action did not entitle *Blue* to have an indictment dismissed. No attempt is made in these cases to have an indictment dismissed. Moreover, it was pointed out earlier that witnesses before a grand jury have considerable freedom to withhold testimony from a grand jury on the basis of a constitutional, statutory or common law privilege. E.g., *Caldwell* v. *United States*, *supra*; *Quinn* v. *United States*, 349 U.S. 155 (1955). Presumably, the Committee Report intended these exceptions to remain.

At most the legislative history suggests that a person who has been illegally wiretapped but is not a witness called by the grand jury may not move to suppress, and that even a witness or defendant who objects to the use of illegal wiretaps in the proceedings may not move to quash

the entire proceeding or even an indictment growing out of it. *In re Egan,* 450 F.2d 199, 206. Such a witness may, however, move to suppress his subpoena or questions put to him if they are based on illegal surveillance.

III.

The problem of delay.

The government argues that the grand jury process should not be delayed to require the government to make a time consuming check of records to put it in the position of being able to answer whether or not a particular witness was ever overheard by electronic surveillance. *Brief for United States* at 26-27. Judge Gibbons in his dissent in *Egan* accepts this argument.

In Section 2519 of Title 18, Congress mandated that federal agencies report individual surveillances, and also periodically compile lists of surveillances lawfully made. The section came into force on June 19, 1968. Even a cursory review of available records should reveal the existence of any illegal surveillance undertaken after June 1968. Accord *In re Carol Evans,* No. 71-1499 (D.C. Cir., July 23, 1971), slip opinion at 16.

Congress has made specific provision for surveillances undertaken before June 19, 1968. The fruits of such surveillances are presumptively useless in investigating events that occur more than five years after the interception. Thus a party is not permitted to object to the admission of evidence tainted by unlawful surveillance if the surveillance was conducted more than five years before the event under investigation. 18 U.S.C. Section 3504(a)(3). Within a

very short time, therefore, the usefulness of all surveillance conducted before 1968 will be entirely exhausted, and the government should be able to resolve these disputes by consulting a readily accessible list. *In re Carol Evans,* No. 71-1499 (D.C. Cir., July 23, 1971), slip opinion at 17-18.

From a practical point of view a claim of delay is unfounded. The vast majority of witnesses are not and will not in the future be hostile to the government's position. Thus the grand jury's ability to gather information will not be seriously impaired. Furthermore, even if *all* future hostile witnesses stand mute and raise an illegal surveillance issue, presumably there will have been no surveillance in the vast majority of these cases, and a contempt hearing will take little longer than the prosecutor's representation to that effect. Only where there actually has been surveillance will a hearing be in any way extended. *In re Egan,* 450 F.2d 199, 220-21 (concurring opinion of Judge Rosenn). If a witness makes such a claim in an attempt to obstruct an investigation, the witness can still be compelled to answer as soon as the government demonstrates that no surveillance was conducted, or that such surveillance was lawful. *In re Carol Evans,* No. 71-1499 (D.C. Cir., July 23, 1971), slip opinion at 18.

Finally, it must be made absolutely clear that "Time properly consumed in the trial of a complex case, or analysis of complex or difficult issues, or in holding a hearing to determine whether one's constitutionally protected rights have been violated is not delay, as that term is used in the context of the courts. The issue implicit in the question of delay is whether the examination of third-party rights as they arise in the context of alleged bad conduct on the part of the Government is by definition dilatory, or unavoidable delay." *In re Calandra,* No. CR 71-300 (N.D. Ohio, October 19, 1971), slip opinion at 8. See e.g., *Jackson* v. *Denno,* 378 U.S. 368 (1964); *Townsend* v. *Sain,* 372 U.S. 293 (1963).

CONCLUSION

For the reasons set forth above, the judgment of the Third Circuit Court of Appeals in *United States* v. *Egan* should be affirmed, and the judgment of the Ninth Circuit Court of Appeals in *Gelbard* v. *United States* should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

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DAVID GELBARD and SIDNEY PARNAS, PETITIONERS

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JOGUES EGAN and ANNE ELIZABETH WALSH

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND THIRD CIRCUITS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to Mr. Justice Douglas' request, during the argument of

these cases, that the government submit a supplemental memorandum discussing further the decisions of this Court on the application of the Fourth Amendment to grand juries.

1. The rule established by decisions of this Court, in our view, is that the Fourth Amendment has a limited application to the proceedings of grand juries. Its primary application is to bar enforcement of grand jury subpoenas deemed to be so over-broad that they constitute a constitutionally-forbidden general search.

In *Hale* v. *Henkel*, 201 U.S. 43, 71-77, this Court concluded that the subpoena *duces tecum* involved was "far too sweeping in its terms to be regarded as reasonable" (at 76) and that the production of so massive a volume of material required a sufficient demonstration of materiality to justify its production. In applying a test of reasonableness, this Court concluded that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment" (at 76), concluding that "[a] general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms" (at 77). This view regarding the Fourth Amendment's limitation upon "the production of corporate records and papers in response to a subpoena or order authorized by law" was reiterated in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 194-218, where this Court observed:

> the Fourth [Amendment], if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant [p. 208].

The holding in *Silverthorne Lumber Co., Inc.* v. *United States*, 251 U.S. 385—that the government cannot obtain a grand jury subpoena directed to a potential defendant's papers that originally came into its hands by a blatantly unjustified and overly broad search and which the court directed the government to return upon holding that their seizure had been illegal—represents a sound but narrow extension of *Hale* v. *Henkel*.

Go-Bart Co. v. *United States*, 282 U.S. 344, suppressed the use of records seized from a corporation in what the Court held was an unreasonable search and seizure. It represented another appropriate but narrow extension of *Hale* v. *Henkel* to deal with an unusual situation far removed from a challenge by a grand jury witness to the evidence on the basis on which the grand jury called or proposed to examine the witness.

2. Mr. Justice Douglas also requested the government to comment on the recent decision of the Seventh Circuit in *Dionisio* v. *United States*, 442 F. 2d 276, pending on petition for a writ of certiorari, No. 71-229. That case and the subsequent decision of that court in *Mara* v. *United States*, No. 71-1740, September Term, 1971, decided December 1, 1971, pending

on petition for a writ of certiorari, No. 71-850, in our view significantly and erroneously extend the application of the Fourth Amendment to grand jury proceedings.[1] They require that a grand jury request for physical evidence from a subpoenaed witness be based upon a showing of reasonable grounds for the request and an inability otherwise to obtain the evidence. As we pointed out in our petitions for certiorari in those cases, the Seventh Circuit, in relying on *Davis* v. *Mississippi*, 394 U.S. 721, thus mistakenly equated a grand jury subpoena with an arrest requiring probable cause.[2] As we there noted, the decision in *Hale* v. *Henkel* itself recognized that the grand jury need not have probable cause to investigate; rather its function is to decide whether there is probable cause to believe that a crime has been committed and whether anyone should be charged.

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[1] The Second Circuit has recently rejected the approach of these cases, *United States* v. *Doe (Cynthia Schwartz)* (No. 663, September Term, 1971), decided March 9, 1972, opinion filed March 28, 1972.

[2] *Davis*, to which Mr. Justice Douglas referred during argument, held that "fingerprints obtained from petitioner should have been excluded from evidence as the product of a detention which was illegal under the Fourth and Fourteenth Amendments" (p. 722). The case involved an application of the exclusionary rule to the particular factual situation involved; it presented no question with respect to compliance with a grand jury subpoena. The *Davis* case accords with the government's position in these cases that a grand jury witness may fully protect himself from any injury he may suffer from an unreasonable search and seizure by preventing the introduction of that evidence against him if the grand jury should indict him.

The position taken by the witnesses in the instant cases goes substantially beyond even *Dionisio* and *Mara*, and far beyond the principles laid down in *Hale* v. *Henkel*, *supra*; *Silverthorne Lumber Co., Inc.* v. *United States*, *supra*; and *Boyd* v. *United States*, 116 U.S. 616. They urge that they are not obliged to answer questions of the grand jury as to non-privileged matters until there has been a final determination of their claim that the grand jury intends to rely upon evidence resulting from an illegal search. They make no claim of over-breadth in the grand jury's inquiry; they seek to thwart a legitimate inquiry not directed at them by litigating the source of the grand jury's determination to call them as witnesses. For reasons set forth in our main briefs in these cases, we believe that position is unsound, and, as this Court said in *Lanza* v. *New York*, 370 U.S. 139, 145, "To hold that the petitioner could not constitutionally be convicted for refusing to answer such questions [before a legislative committee] simply because they related to a conversation which had been unlawfully overheard by other state officials would thus be a completely unprecedented step."

Neither *Hale* v. *Henkel* nor any other case in this Court suggests that—under the Fourth Amendment—witnesses have no duty to testify before the grand jury unless and until it has been judicially determined

that the evidence leading to their subpoenas or questions to be asked of them was lawfully obtained.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GELBARD ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–110. Argued March 27, 1972—Decided June 26, 1972*

Where a grand jury witness is adjudicated in civil contempt under 28 U. S. C. § 1826 (a) for refusing "without just cause shown to comply with an order of the court to testify," the witness may invoke as a defense 18 U. S. C. § 2515, which directs that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury . . . ," since a showing that the interrogation would be based upon the illegal interception of the witness' communications would constitute the "just cause" that precludes a finding of contempt. Pp. 5–20.

No. 71–110, 443 F. 2d 837, reversed and remanded; No. 71–263, 450 F. 2d 199 and 450 F. 2d 231, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. DOUGLAS and WHITE, JJ., filed concurring opinions. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and POWELL, JJ., joined.

*Together with No. 71–263, *United States* v. *Egan et al.*, on certiorari to the United States Court of Appeals for the Third Circuit.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 26, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

These cases present challenges to the validity of adjudications of civil contempt, pursuant to 28 U. S. C. § 1826 (a),[1] of witnesses before federal grand juries

[1] Section 1826 (a) provides:

"Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

"(1) the court proceeding, or

"(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

This provision was enacted as part of the Organized Crime Control Act of 1970. It was intended to codify the existing practice of the federal courts. S. Rep. No. 91–617, 91st Cong., 1st Sess., 33, 56–

who refused to comply with court orders to testify. The refusals were defended upon the ground that interrogation was to be based upon information obtained from the witnesses' communications, allegedly intercepted by federal agents by means of illegal wiretapping and electronic surveillance. A provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, as amended, 18 U. S. C. §§ 2510–2520, directs that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any . . . proceeding in or before any . . . grand jury, . . . if the disclosure of that information would be in violation of this chapter." 18 U. S. C. § 2515.[2] The question presented is whether grand jury witnesses, in proceedings under 28 U. S. C. § 1826 (a), are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify. In No. 71–110, the Court of Appeals for the Ninth Circuit held that they are not entitled to do so. *United States* v. *Gelbard*, 443 F. 2d 837 (1971). In No. 71–263, the Court of Appeals for the Third Circuit, *en banc*, reached the contrary conclusion. *In re Egan*,

57, 148–149 (1969); H. R. Rep. No. 91–1549, 91st Cong., 2d Sess., 33, 46 (1970); see *Shillitani* v. *United States*, 394 U. S. 364 (1966).

[2] Section 2515 provides in full:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

450 F. 2d 199 (1971); *In re Walsh*, 450 F. 2d 231 (1971). We granted certiorari. 404 U. S. 990 (1971).[3] We disagree with the Court of Appeals for the Ninth Circuit and agree with the Court of Appeals for the Third Circuit.

No. 71–110. A federal district judge approved wiretaps by federal agents of the telephones of Perry Paul, an alleged bookmaker, and Jerome Zarowitz, a former executive of a Las Vegas casino. In the course of those taps, the agents overheard conversations between Paul and petitioner Gelbard and between Zarowitz and petitioner Parnas. Petitioners were subsequently called before a federal grand jury convened in Los Angeles to investigate possible violations of federal gambling laws. The Government asserted that petitioners would be questioned about third parties and that the questions would be based upon petitioners' intercepted telephone conversations. Petitioners appeared before the grand jury, but declined to answer any questions based upon their intercepted conversations until they were afforded an opportunity to challenge the legality of the interceptions. Following a hearing, the United States District Court for the Central District of California found petitioners in contempt and, pursuant to 28 U. S. C. § 1826 (a), committed them to custody for

[3] The Third Circuit followed *Egan* in *In re Maratea*, 444 F. 2d 499 (1971) (*en banc*). The District of Columbia Circuit has aligned itself with the Third, see *In re Evans*, 452 F. 2d 1239 (1971); while the Ninth has continued to follow *Gelbard*, see *Bacon* v. *United States*, 446 F. 2d 667 (1971); *Olsen* v. *United States*, 446 F. 2d 912 (1971); *In re Russo*, 448 F. 2d 369 (1971); *Reed* v. *United States*, 448 F. 2d 1276 (1971); *United States* v. *Reynolds*, 449 F. 2d 1347 (1971). The First and Fifth Circuits have also adverted to the question. *In re Marx*, 451 F. 2d 466 (CA1 1971); *In re Popkin*, — F. 2d — (1972); *Dudley* v. *United States*, 427 F. 2d 1140 (CA5 1970). See also *United States ex rel. Rosado* v. *Flood*, 394 F. 2d 139 (CA2 1968); *Carter* v. *United States*, 417 F. 2d 384 (CA9 1969).

the life of the grand jury or until they answered the questions.

No. 71–263. Respondents Egan and Walsh were called before a federal grand jury convened in Harrisburg, Pennsylvania, to investigate, among other possible crimes, an alleged plot to kidnap a Government official. Pursuant to 18 U. S. C. § 2514, both respondents were granted transactional immunity in return for their testimony. Respondents appeared before the grand jury, but refused to answer questions on the ground, among others, that the questions were based upon information overheard from respondents by means of the Government's illegal wiretapping and electronic surveillance. The Government did not reply to respondents' allegations.[4] Following a hearing, the United States District Court for the Middle District of Pennsylvania found respondents in contempt, and they were also committed to custody pursuant to 28 U. S. C. § 1826 (a).

Section 1826 (a) expressly limits the adjudication of civil contempt to the case of a grand jury witness who "refuses without just cause shown to comply with an order of the court to testify." Our inquiry, then, is whether a showing that interrogation would be based upon the illegal interception of the witness's communications constitutes a showing of "just cause" that precludes a finding of contempt. The answer turns on the construction of Title III of the Omnibus Act.[5]

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[4] See n. 23, *infra*.

[5] In view of our disposition of these cases, we do not reach any of the constitutional issues tendered as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions. We also note that the constitutionality of Title III is not challenged in these cases.

I

In Title III, Congress enacted a comprehensive scheme for the regulation of wiretapping and electronic surveillance. See *United States* v. *United States District Court, ante,* at 4–8. Title III authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stringent conditions. 18 U. S. C. §§ 2516, 2518 (1)–(8). If a wire or oral communication is intercepted in accordance with the provisions of Title III, the contents of the communication may be disclosed and used under certain circumstances. 18 U. S. C. § 2517. Except as expressly authorized in Title III, however, all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U. S. C. § 2511 (1), and the victim of such interception, disclosure, or use is entitled to recover civil damages, 18 U. S. C. § 2520. Title III also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, 18 U. S. C. § 2515, and provides procedures for moving to suppress such evidence in various proceedings, 18 U. S. C. § 2518 (9)–(10).

The witnesses in these cases were held in contempt for disobeying court orders by refusing to produce evidence—their testimony—before grand juries. Consequently, their primary contention is that § 2515, the evidentiary prohibition of Title III, afforded them a defense to the contempt charges. In addressing that contention, we must assume, in the present posture of

these cases, that the Government has intercepted communications of the witnesses and that the testimony the Government seeks from them would be, within the meaning of § 2515, "evidence derived" from the intercepted communications. We must also assume that the communications were not intercepted in accordance with the specified procedures and thus that the witnesses' potential testimony would be "disclosure" in violation of Title III. See 18 U. S. C. §§ 2511 (1), 2517 (3). In short, we proceed on the premise that § 2515 prohibits the presentation to grand juries of the compelled testimony of these witnesses.

The narrow question, then, is whether under these circumstances the witnesses may invoke the prohibition of § 2515 as a defense to contempt charges brought on the basis of their refusal to obey court orders to testify. We think they may.

The unequivocal language of § 2515 expresses the fundamental policy adopted by Congress on the subject of wiretapping and electronic surveillance. As the congressional findings for Title III make plain, that policy is strictly to limit the employment of those techniques of acquiring information:

> "To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information

obtained thereby will not be misused." § 801 (d), 82 Stat. 211.[6]

The Senate committee report that accompanied Title III underscores the congressional policy:

> "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause." S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968).

Hence, although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern.[7] Indeed, the congressional findings articulate

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[6] "Paragraph (d) recognizes the responsible part that the judiciary must play in supervising the interception of wire or oral communications in order that the privacy of innocent persons may be protected: . . . the interception or use of wire or oral communications should only be on court order. Because of the importance of privacy, such interceptions should further be limited to major offenses and care must be taken to insure that no misuse is made of any information obtained." S. Rep. No. 1097, 90th Cong., 2d Sess., 89 (1968).

[7] In stating the problem addressed by Congress in Title III, the Senate report noted that "[b]oth proponents and opponents of wiretapping and electronic surveillance agree that the present state of the law in this area is extremely unsatisfactory and that the Congress should act to clarify the resulting confusion." S. Rep. No.

clearly the intent to utilize the evidentiary prohibition of § 2515 to enforce the limitations imposed by Title III upon wiretapping and electronic surveillance:

> "In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and *the use of the contents thereof in evidence in courts and administrative proceedings.*" § 801 (b), 82 Stat. 211 (emphasis added).[8]

And the Senate report, like the congressional findings, specifically addressed itself to the enforcement, by means

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1097, 90th Cong., 2d Sess., 67 (1968). The report agreed: "It would be, in short, difficult to devise a body of law from the point of view of privacy or justice more totally unsatisfactory in its consequences." *Id.*, at 69. The report then stressed that Title III would provide the protection for privacy lacking under the prior law:

"The need for comprehensive, fair and effective reform setting uniform standards is obvious. *New protections for privacy must be enacted.* Guidance and supervision must be given to State and Federal law enforcement officers. This can only be accomplished through national legislation. This the subcommittee proposes." *Ibid.* (emphasis added).

[8] "Paragraph (b) recognizes that to protect the privacy of wire and oral communications, to protect the integrity of court and administrative proceeding[s] and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire or oral communications may be authorized. It also finds that all unauthorized interception of such communications should be prohibited, as well as *the use of the contents of unauthorized interceptions as evidence in courts and administrative hearings.*" S. Rep. No. 1097, 90th Cong., 2d Sess., 89 (1968) (emphasis added).

of § 2515, of the limitations upon invasions of individual privacy:

> "Virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification where communications are intercepted without the consent of one of the participants. No one quarrels with the proposition that the unauthorized use of these techniques by law enforcement agents should be prohibited. . . . Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.* Each of these objectives is sought by the proposed legislation." S. Rep. No. 1097, *supra*, at 69 (emphasis added).

Section 2515 is thus central to the legislative scheme. Its importance as a protection for "the victim of an unlawful invasion of privacy" could not be more clear.[9]

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[9] "Section 2515 of the new chapter imposes an evidentiary sanction to compel compliance with the other prohibitions of the chapter. It provides that intercepted wire or oral communications or evidence derived therefrom may not be received in evidence in any proceeding before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision of a State, where the disclosure of that information would be in violation of this chapter. . . . [I]t is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy. The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and civil remedies, it should serve to guarantee that the standards of the new chapter will sharply

The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications,[10] but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also "to protect the integrity of court and administrative proceedings." Consequently, to order a grand jury witness, on pain of imprisonment, to disclose evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents.

In sum, Congress simply cannot be understood to have sanctioned orders to produce evidence excluded from grand jury proceedings by § 2515. Contrary to the Government's assertion that the invasion of privacy is over and done with, to compel the testimony of these witnesses compounds the statutorily proscribed invasion of their privacy by adding to the injury of the interception the

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curtail the unlawful interception of wire and oral communications." S. Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968) (citations omitted).

[10] Congressional concern with the protection of the privacy of communications is evident also in the specification of what is to be protected. "The proposed legislation is intended to protect the privacy of the communication itself . . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., 90 (1968). As defined in Title III, "'contents,' when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 18 U. S. C. § 2510 (8). The definition thus "include[s] all aspects of the communication itself. No aspect, including the identity of the parties, the substance of the communication between them, or the fact of the communication itself, is excluded. The privacy of the communication to be protected is intended to be comprehensive." S. Rep. No. 1097, *supra*, at 91.

insult of compelled disclosure. And, of course, Title III makes illegal not only unauthorized interceptions, but also the disclosure and use of information obtained through such interceptions. 18 U. S. C. § 2511 (1); see 18 U. S. C. § 2520. Hence, if the prohibition of § 2515 is not available as a defense to the contempt charge, disclosure through compelled testimony makes the witness the victim, once again, of a federal crime. Finally, recognition of § 2515 as a defense "relieves judges of the anomalous duty of finding a person in civil contempt for failing to cooperate with the prosecutor in a course of conduct which, if pursued unchecked, could subject the prosecutor himself to heavy civil and criminal penalties." *In re Egan*, 450 F. 2d 199, 220 (CA3 1971) (Rosenn, J., concurring). "And for a court, on petition of the executive department, to sentence a witness, who is herself the victim of the illegal wiretapping, to jail for refusal to participate in the exploitation of that crime in violation of the explicit command of Section 2515 is to stand our whole system of criminal justice on its head." *In re Evans*, 452 F. 2d 1239, 1252 (CADC 1971) (Wright, J., concurring).

II

Our conclusion that § 2515 is an available defense to the contempt charge finds additional support in 18 U. S. C. § 3504, enacted as part of the Organized Crime Control Act of 1970, 84 Stat. 935. Section 3504 is explicit confirmation that Congress intended that grand jury witnesses, in reliance upon the prohibition of § 2515, might refuse to answer questions based upon the illegal interception of their communications.

Section 3504 (a)(1) provides:

"In any . . . proceeding in or before any . . . grand jury . . . .

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

Under § 3504 (a)(2), disclosure of information relating to the claim of inadmissibility is not mandatory if the "unlawful act" took place before June 19, 1968, the effective date of Title III. Under § 3504 (a)(3), there is a five-year limitation upon the consideration of a claim of inadmissibility based upon "the exploitation of an unlawful act" that took place before June 19, 1968. Section 3504 (b), by reference to Title III, defines an "unlawful act" as one involving illegal wiretapping or electronic surveillance.[11]

[11] Section 3504 provides in full:

"(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

"(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

"(2) disclosure of information for a determination if evidence is inadmissible because it is the primary product of an unlawful act occurring prior to June 19, 1968, or because it was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, shall not be required unless such information may be relevant to a pending claim of such inadmissibility; and

"(3) no claim shall be considered that evidence of an event is inadmissible on the ground that such evidence was obtained by the exploitation of an unlawful act occurring prior to June 19, 1968, if such event occurred more than five years after such allegedly unlawful act.

"(b) As used in this section, 'unlawful act' means any act the use of any electronic, mechanical, or other device (as defined in section

Section 3504, then, establishes procedures to be followed "upon a claim by a party aggrieved that evidence is inadmissible because" of an illegal interception. And § 3504 tracks § 2515 in its application to grand jury proceedings. Indeed, "[t]he language used in defining the types of proceedings, types of forums, and jurisdictions in which section 3504 is applicable was taken from 18 U. S. C. § 2515." S. Rep. No. 91–617, 91st Cong., 1st Sess., 154 (1969).[12] In the application of § 3504 to "any . . . proceeding in or before any . . . grand jury," "a party aggrieved" can only be a witness, for there is no other "party" to a grand jury proceeding. Moreover, a "claim . . . that evidence is inadmissible" can only be a claim that the witness's potential testimony is inadmissible. Hence, § 3504, by contemplating "a claim by a party aggrieved that evidence is inadmissible because" of an illegal interception, necessarily recognizes that grand jury witnesses may rely upon the prohibition of § 2515 in claiming that the evidence sought from them is inadmissible in the grand jury proceedings. Upon such a claim by a grand jury witness, the Government, as "the opponent of the claim," is required under § 3504 (a)(1) to "affirm or deny the occurrence of the alleged" illegal interception. Section 3504 thus confirms that Congress meant that grand jury witnesses might defend contempt charges

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2510 (5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto."

No question as to the constitutionality of § 3504 is raised in these cases.

[12] "The only exception is that section 350 [4] omits legislative committees." S. Rep. No. 91–617, 91st Cong., 1st Sess., 154 (1969). In addition, the House amended § 3504, as passed by the Senate, so that, unlike § 2515, it "applies only to trials and other proceedings conducted under authority of the United States." H. R. Rep. No. 91–1549, 91st Cong., 2d Sess., 51 (1970).

by invoking the prohibition of § 2515 against the compelled disclosure of evidence obtained in violation of Title III.

The Government urges, however, that the procedures prescribed in § 3504 are limited in application to claims of inadmissibility based upon illegal interceptions that took place before June 19, 1968, and that § 3504 cannot, therefore, provide support for a construction of § 2515. We disagree. While subsections (a)(2) and (a)(3) apply only when the illegal interception took place before June 19, 1968, it is clear both from the face of § 3504[13] and from its legislative history that subsection (a)(1), imposing the duty upon "the opponent of the claim" to "affirm or deny the occurrence of the alleged" illegal interception, is not similarly limited.

The omission of the June 19, 1968, date from subsection (a)(1) was not inadvertent. Subsection (a)(1) was not in the original Senate bill, although the bill did contain counterparts of present subsections (a)(2) and (a)(3) without the June 19, 1968, or any other date limitation.[14] See Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee on S. 30 *et al.*, 91st Cong., 1st Sess., 102–105 (1969). Subsection (a)(1) was added at the suggestion of the Department of Justice. At that time the De-

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[13] The references to June 19, 1968, appear only in subsections (a)(2) and (a)(3). Subsection (a)(1) does not similarly limit the term "unlawful act" with the phrase "occurring prior to June 19, 1968." See n. 11, *supra*. It is thus plain on the face of § 3504 that Congress did not make the duty imposed by subsection (a)(1) dependent upon the date of the alleged illegal interception.

[14] The Senate passed § 3504 in a form that, so far as is pertinent to the issue before us, differed from the section as finally enacted only in that subsections (a)(2) and (a)(3) in the Senate version were not limited in application to illegal interceptions that took place before June 19, 1968. See S. Rep. No. 91–617, 91st Cong., 1st Sess., 15, 70 (1969).

partment followed the practice of searching Government files for information about wiretaps and eavesdrops. The Department advised the Senate Judiciary Committee that while it had been "conduct[ing] such examinations as a matter of policy even in cases where no motion ha[d] been filed . . . defendants should be assured such an examination by a specific requirement of law rather than hav[ing] to rely upon the continued viability of a current policy." *Id.*, at 553. The Senate report on § 3504 explained that "since [subsection (a)(1)] requires a pending claim as a predicate to disclosure, it sets aside the present wasteful practice of the Department of Justice in searching files without a motion from a defendant." S. Rep. No. 91–617, 91st Cong., 1st Sess., 154 (1969).

The reason assigned in the Senate for enacting subsection (a)(1) was thus as applicable to post- as it was to pre-June 19, 1968, interceptions. The same was true of the House. There subsection (a)(1) was supported on the ground that it would be beneficial to the victims of illegal interceptions. Senator McClellan, for example, testified before the House Judiciary Subcommittee that subsection (a)(1) "places upon the Government an affirmative duty to answer a claim that evidence is inadmissible because of unlawful investigative conduct." "The first requirement [of § 3504], that the Government admit or deny the occurrence of the alleged invasion of the defendant's rights, actually places or codifies a burden upon the Government, rather than the defendant." Hearings before Subcommittee No. 5 of the House Judiciary Committee on S. 30 *et al.*, 91st Cong., 2d Sess., 84, 104 (1970). Other witnesses thought the provision unnecessary.[15] Indeed, one organization submitted a re-

[15] "[Subsection (a)(1)] provides that in an attack upon the admissibility of evidence because it is the product of an unlawful act . . . , the opponent of such claim shall affirm or deny the

port that disapproved subsection (a)(1) on the ground that the Government should admit illegalities without a prior claim. *Id.*, at 562 (Section of Criminal Law of the American Bar Association). It is also significant that congressional questioning of a representative of the Department of Justice at the hearings was directed to the Department's views on the insertion of a date limitation only in subsections (a)(2) and (a)(3). *Id.*, at 659; see the Department's written response, *id.*, at 675–676.

The June 19, 1968, date was inserted in subsections (a)(2) and (a)(3) after the conclusion of the House hearings. It is apparent from the House report that only subsections (a)(2) and (a)(3) of the Senate version were to be limited by the June 19, 1968, date and that subsection (a)(1) was to be operative without regard to when the alleged illegal interception may have taken place:

> "Paragraph (1) provides that upon a claim by an aggrieved party that evidence is inadmissible because it is the primary product of an unlawful act, or because it was obtained by the exploitation of an unlawful act, the opponent of the claim must affirm or deny the occurrence of the alleged unlawful act. Under this provision, upon a charge by the defendant with standing to challenge the alleged unlawful conduct, the Government would be required to affirm or deny that an unlawful act

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alleged unlawful act . . . . In this respect, [§ 3504] is unnecessary." Hearings before Subcommittee No. 5 of the House Judiciary Committee on S. 30 *et al.*, 91st Cong., 2d Sess., 399 (1970) (report of the Committee on Federal Legislation of the New York County Lawyers' Association). "That is the law now by Supreme Court decision. [Subsection (a)(1)] adds nothing to what exists right now." *Id.*, at 513 (testimony of Lawrence Speiser, representing the American Civil Liberties Union).

> involving electronic surveillance had in fact occurred. If such an unlawful act had in fact occurred, paragraph (2), below, will govern disclosure of the contents of the electronic surveillance records or transcripts to the defendant and his counsel, unless paragraph (3) applies." H. R. Rep. No. 91–1549, 91st Cong., 2d Sess., 51 (1970).

This explanation demonstrates that "the opponent of the claim" [16] has a duty to "affirm or deny" whenever "a party aggrieved" "claim[s] . . . that evidence is inadmissible because it is" derived from an illegal interception. The date June 19, 1968, becomes relevant only after it is determined that an illegal interception took place and an issue thus arises as to disclosure of information bearing on the claim.[17]

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[16] Congress, of course, was primarily concerned with "certain evidentiary problems created by electronic surveillance conducted by the Government prior to the enactment of [Title III] on June 19, 1968, which provided statutory authority for obtaining surveillance warrants in certain types of criminal investigations (18 U. S. C. 2516)." H. R. Rep. No. 91–1549, 91st Cong., 2d Sess., 50 (1970). As the Senate report noted, however, § 3504 applies to "[c]ivil as well as criminal proceedings . . . , regardless of whether a government or governmental body or officer is or is not a party or witness." S. Rep. No. 91–617, 91st Cong., 1st Sess., 154 (1969). Moreover, "unlawful acts," as defined in § 3504 (b), may be "acts of private citizens, as well as acts of Federal or State officials." *Ibid.*

[17] "Under paragraph (2) disclosure of the information shall be required to be made to a defendant who has demonstrated the illegality of the electronic surveillance (occurring prior to June 19, 1968) and his standing where such information is or 'may be' relevant to a claim of inadmissibility. In cases where the electronic surveillance occurred on or after June 19, 1968, disclosure is mandatory where illegality and standing are demonstrated. The provision thus alters the procedure announced in *Alderman* v. *United States*, 394 U. S. 165 (1968) [*sic*] with respect to 'unlawful acts' committed prior to June 19, 1968." H. R. Rep. No. 91–1549, 91st Cong., 2d Sess., 51 (1970).

III

The Government argues, finally, that while § 2515 could be construed to allow a grand jury witness to invoke its prohibition as a defense to a contempt charge, "[i]f this section were the only relevant portion of [Title III]," Brief in No. 71–263, at 19, proceedings before grand juries are omitted from another provision of Title III, § 2518 (10)(a), that authorizes "[a]ny aggrieved person," [18] in specified types of proceedings, to "move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom." [19] But it does not follow from the asserted omission of grand jury proceedings from the suppression provision that grand jury witnesses cannot invoke § 2515 as a defense in a contempt proceeding under 28 U. S. C. § 1826 (a).[20]

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[18] An "aggrieved person," for purposes of § 2518 (10)(a), is "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." 18 U. S. C. § 2510 (11); see S. Rep. No. 1097, 90th Cong., 2d Sess., 91, 106 (1968).

[19] Section 2518 (10) provides in pertinent part:

"Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom . . . ."

While on its face § 2518 (10)(a) applies to grand jury proceedings, when compared with the list of proceedings in § 2515, see n. 2, *supra*, it appears that "grand jury" was omitted from the list in § 2518 (10)(a).

[20] "Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. . . . It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). This assertion is not unambiguous, for motions to sup-

The congressional concern with the applicability of § 2518 (10) (a) in grand jury proceedings, so far as it is discernible from the Senate report, was apparently that defendants and potential defendants might be able to utilize suppression motions to impede the issuance of indictments: "Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. (*Blue* v. *United States*, 384 U. S. 251 (1965) [*sic*].) There is no intent to change this general rule." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). The "general rule," as illustrated in *Blue*, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government "acquire[d] incriminating evidence in violation of the [law]," even if the "tainted evidence was presented to the grand jury." 384 U. S., at 255 and n. 3; see *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1956). But that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt. Hence, we cannot agree that the Senate report expressed the view that a grand jury witness would be foreclosed from raising the § 2515 defense in a contempt proceeding under § 1826 (a).

Furthermore, grand jury witnesses do not normally discover whether they may refuse to answer questions by filing motions to suppress their potential testimony. The usual procedure is, upon the Government's motion, to have a court order a grand jury witness to testify upon penalty of contempt for noncompliance. Section 1826 (a) embodies that traditional procedure. The asserted omission of grand jury proceedings from § 2518 (10)(a) may well reflect congressional acceptance of

press evidence to be presented to a grand jury would presumably be made in court.

that procedure as adequate in these cases. Consequently, we cannot suppose that Congress, by providing procedures for suppression motions, intended to deprive grand jury witnesses of the § 2515 defense that would otherwise be available to them. Although the Government points to statements in the Senate report to the effect that § 2518 (10) (a) "limits" § 2515, we read those statements to mean that suppression motions, as a method of enforcing the prohibition of § 2515, must be made in accordance with the restrictions upon forums, procedures, and grounds specified in § 2518 (10) (a).[21]

The judgment of the Court of Appeals for the Ninth Circuit in No. 71–110 is reversed, and the case is remanded for further proceedings consistent with this opinion.[22] The judgment of the Court of Appeals for the Third Circuit in No. 71–263 is affirmed.[23]

It is so ordered.

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[21] "This definition [§ 2510 (11)] defines the class of those who are entitled to invoke the suppression sanction of section 2515 . . . through the motion to suppress provided for by section 2518 (10) (a) . . . ." S. Rep. No. 1097, 90th Cong., 2d Sess., 91 (1968). "The provision [§ 2515] must, of course, be read in light of section 2518 (10) (a) . . . which defines the class entitled to make a motion to suppress." *Id.*, at 96. "This provision [§ 2518 (10) (a)] must be read in connection with sections 2515 and 2517 . . . which it limits. It provides the remedy for the right created by section 2515." *Id.*, at 106.

[22] Because the District Court and the Court of Appeals erroneously held that grand jury witnesses have no right to invoke a § 2515 defense in contempt proceedings under § 1826 (a), we need not decide whether Gelbard and Parnas may refuse to answer questions if the interceptions of their conversations were pursuant to court order. That is a matter for the District Court to consider in the first instance.

[23] The Court of Appeals vacated the judgments of contempt and remanded for hearings to determine whether the questions asked respondents resulted from the illegal interception of their communications. 450 F. 2d., at 217. Although, in this Court, the Government now denies that there was any overhearing, in view of our affirmance that is a matter for the District Court to consider in the first instance.

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 26, 1972]

MR. JUSTICE DOUGLAS, concurring.

Although I join in the opinion of the Court, I believe that, independently of any statutory refuge which Congress may choose to provide, the Fourth Amendment shields a grand jury witness from any question (or any subpoena) which is based upon information garnered from searches which invade his own constitutionally protected privacy.

I would hold that Title III of the 1968 Act offends the Fourth Amendment, as does all wiretapping and bugging, for reasons which I have often expressed elsewhere. *E. g., Cox* v. *United States*, 405 U. S. ——; *Williamson* v. *United States*, 405 U. S. ——; *Katz* v. *United States*, 389 U. S. 347, 359; *Berger* v. *New York*, 388 U. S. 41, 64; *Osborn* v. *United States*, 385 U. S. 323, 340; *Pugach* v. *Dollinger*, 365 U. S. 458, 459; *On Lee* v. *United States*, 343 U. S. 747, 762. In each of the present cases a grand jury witness seeks to prove and vindicate suspected unconstitutional seizures of his own telephone conversations. And, in every relevant respect, the proceedings below were in striking parallel to those in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.

In that case, after federal agents unlawfully seized papers belonging to the Silverthornes and to their lumber company, the documents were returned upon order of the court. In the interim, however, the agents had copied them. After returning the seized originals, the prosecutor attempted to regain possession of them by issuing a grand jury subpoena *duces tecum*. When the respondents refused to comply with the subpoena they were convicted of contempt. In reversing those judgments, this Court through Mr. Justice Holmes, held that the Government was barred from reaping any fruit from its forbidden act and wove into our constitutional fabric the celebrated maxim that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U. S., at 392.

Petitioners Gelbard and Parnas and respondents Egan and Walsh occupy positions which are virtually identical to that of the Silverthornes and their company. They desire to demonstrate that but for unlawful surveillance of them the grand jury would not now be seeking testimony from them. And, as in *Silverthorne*, they are the victims of the alleged violations, seeking to mend no one's privacy other than their own. Finally, here, as there, the remedy preferred is permission to refuse to render the requested information.

Unless *Silverthorne* is to be overruled and uprooted from those decisions which have followed it, such as *Nardone* v. *United States*, 308 U. S. 338, 340–341; *Benanti* v. *United States*, 355 U. S. 96, 103; *Elkins* v. *United States*, 364 U. S. 206, 217; *Mapp* v. *Ohio*, 367 U. S. 643, 648; *Wong Sun* v. *United States*, 371 U. S. 471, 485; *Harrison* v. *United States*, 392 U. S. 219, 222; and *Alderman* v. *United States*, 394 U. S. 171, 177, these witnesses deserve opportunities to prove their allegations and, if successful, to withhold from the Government any

further rewards of its "dirty business." *Olmstead* v. *United States*, 277 U. S. 438, 470 (Holmes, J., dissenting).

The Solicitor General does not propose that *Silverthorne* be overruled. Nor does he deny its remarkable similarity. Indeed, his analysis of the constitutional issue at stake here fails even to mention that landmark decision.[1] And none of the precedents cited by him detract from *Silverthorne*'s vitality.[2]

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[1] At oral argument, counsel for the United States contended that *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, was distinguishable. First, it was said that in this case there has yet been no showing of illegal surveillance. Tr. of Oral Arg. 26. The point is, however, that these witnesses claim to be able to make such a showing, although none of the trial courts below have permitted hearings on the issue. Second, it was also argued that *Silverthorne* was inapposite because there the very papers seized unlawfully were the very papers seized unlawfully were the ones later sought under the court's subpoena. *Ibid.* But there is little doubt that Justice Holmes' reasoning would also have relieved the Silverthornes from testifying before the grand jury as to the contents of the purloined papers.

[2] Three of the cases cited by the Solicitor General stand for nothing more than the rule that a defendant may not challenge prior to trial the evidence from which the indictment was drawn. *Costello* v. *United States*, 350 U. S. 359; *Lawn* v. *United States*, 355 U. S. 339; *United States* v. *Blue*, 384 U. S. 251. To be sure, the other authorities cited rejected various privileges from testifying but only for reasons which are not in conflict with *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. For example, in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52; and *Piemonte* v. *United States*, 367 U. S. 556, in light of our dispositions in those cases, no threatened constitutional violation remained as a predicate for a privilege. For in *Murphy* we eliminated the threat that testimony to a state grand jury given in exchange for a state immunity grant could, despite the witness' fears to the contrary, be used against him by other jurisdictions. And in *Piemonte* the Fifth Amendment basis for declining to answer was dissolved by the majority's finding that there had been a proper grant of immunity. True, *Goldstein* v. *United States*, 316 U. S. 114, 121, and *Alderman* v. *United States*, 394 U. S. 165, denied standing to defendants to suppress the fruits of Fourth Amendment injuries to others, but that issue is not presented here inasmuch as all of these

Rather, the Government treats this decision as a "novel extension" of Fourth Amendment protections, leaning heavily upon the observation that the exclusionary rule has never been extended to "provide that illegally seized evidence is inadmissible against anyone for any purpose." *Alderman, supra*, at 175. This aphorism is contravened, concludes the Solicitor General, by any result permitting a nondefendant to "suppress" evidence sought to be introduced at another's trial or to withhold testimony from a grand jury investigation of someone else.

To be sure, no majority of this Court has ever held that "anything which deters illegal searches is thereby commanded by the Fourth Amendment." *Id.*, 174. But that concern is not at stake here. No one is attempting to assert vicariously the rights of others. Here it is only necessary to adhere to the basic principle that victims of unconstitutional practices are themselves entitled to effective remedies. For, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U. S. 678, 684. And see *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388.

The fact that the movants below sought to *withhold* evidence does not transform these cases into unusual ones. A witness is often permitted to retain exclusive custody

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movants purported to be victims of intercepted conversations. Finally, *Blair* v. *United States*, 250 U. S. 273, held that a grand jury witness may not withhold evidence solely because he believes that the statutes (which the grand jury suspects may have been violated) are unconstitutional. That contention, of course, has not been tendered by these grand jury witnesses. Moreover, *Blair* itself recognizes that "for special reasons a witness may be excused from telling all that he knows." *Id.*, 281. "Special reasons" presumably was meant to include Fourth Amendment grounds, as was permitted shortly thereafter in *Silverthorne*.

of information where a contrary course would jeopardize important liberties such as First Amendment guarantees, *Watkins* v. *United States*, 354 U. S. 178; *NAACP* v. *Alabama*, 357 U. S. 449, 463; *Gibson* v. *Florida Legislative Investigating Committee*, 372 U. S. 539; *Baird* v. *State Bar*, 401 U. S. 1, 6–7; *In re Stolar*, 401 U. S. 23; Fifth Amendment privileges, *Hoffman* v. *United States*, 341 U. S. 479, or traditional testimonial privileges.[3]

The same is true of Fourth Amendment authority to withhold evidence, even from a grand jury. *Hale* v. *Henkel*, 201 U. S. 43; *Silverthorne*, *supra*. No one would doubt, for example, that under *Bell* v. *Hood*, *supra*, and *Bivens* (or *Monroe* v. *Pape*, 365 U. S. 167, where state police were concerned) a telephone subscriber could obtain an injunction against unlawful wiretapping of his telephone despite the fact that such termination might remove from the Government's reach evidence with which it could convict third parties.

A contrary judgment today would cripple enforcement of the Fourth Amendment. For, if these movants, whom the Solicitor General concedes are not the prosecutors' targets, were required to submit to interrogation, then they (unlike prospective defendants) would have no further opportunity to vindicate their injuries. More generally, because surveillances are often "directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions," *United States* v. *United States District Court*, *ante*, —, —, the normal exclusionary threat of *Weeks* v. *United States*, 232 U. S. 383, would be sharply attenuated and intelligence centers would be loosed from virtually every

[3] *E. g.*, *Alexander* v. *United States*, 138 U. S. 353 (lawyer-client); *Blau* v. *United States*, 340 U. S. 332 (marital); *United States* v. *Reynolds*, 345 U. S. 1 (military aircraft specifications).

deterrent against abuse.[4] Furthermore, even where the "uninvited ear" is used to obtain criminal convictions, rather than for domestic spying, a rule different from our result today would supply police with an added incentive to record the conversations of suspected co-conspirators in order to marshall evidence against alleged ringleaders. We are told that "[p]olice are often tempted to make illegal searches during the investigations of a large conspiracy. Once the police have established that several individuals are involved, they may deem it worthwhile to violate the constitutional rights of one member of the conspiracy (particularly a minor member) in order to obtain evidence for use against others." White & Greenspan, Standing to Object to Search and Seizure, 118 U. Pa. L. Rev. 333, 851 (1970) (footnotes omitted). Because defendants are normally denied "standing" to suppress evidence procured as a result of invasions of others' privacies today's remedy is necessary to help neutralize the prosecutorial reward of such tactics.

Today's remedy assumes an added and critical measure of importance for, due to the clandestine nature of electronic eavesdropping, other inhibitions on officers' abuse, such as the threat of damage actions, reform through the political process, and adverse publicity, will be of little avail in guarding privacy.

Moreover, when a court assists the Government in extracting fruits from the victims of its lawless searches it

[4] Our remark in *United States* v. *United States District Court*, *ante*, —, was our understanding only of the motivation behind federal national security wiretapping. But the statistical evidence shows that nonsecurity wiretapping also is seldom used to convict criminals. In 1969, court-ordered federal wiretapping seized 44,940 conversations but only 24 convictions were obtained. In 1970, federal court orders permitted the seizure of 147,780 communications with 48 convictions. H. Schwartz, A Report on the Costs and Benefits of Electronic Surveillance ii–iv (1971).

degrades the integrity of the judicial system. For "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio*, 367 U. S. 643, 659. For this reason, our decisions have embraced the view that "[t]he tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts, which are at all times charged with support of the Constitution." *Weeks* v. *United States*, 232 U. S. 383, 390. As mentioned earlier, this principle was at the heart of the *Silverthorne* decision. Later in his dissent in *Olmstead* v. *United States*, 277 U. S. 438, 470, a case in which federal wiretappers had violated an Oregon law, Justice Holmes, citing *Silverthorne*, thought that both the officers and the court were honor bound to observe the state law: "If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." In the same case, Justice Brandeis, who was then alone in his view that wiretapping was a search within the meaning of the Fourth Amendment, phrased it this way: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker then it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Id.*, 485.

In an entrapment case, Justice Frankfurter, with whom Justices Harlan, BRENNAN, and I joined, thought that "the federal courts have an obligation to set their face against enforcement of the law by lawless means" because "[p]ublic confidence in the fair and honorable

administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." *Sherman* v. *United States*, 356 U. S. 369, 380 (dissenting opinion); see also his opinion for the Court in *Nardone* v. *United States*, 308 U. S. 338, 340–341. In a Self-Incrimination Clause decision, JUSTICE BRENNAN (joined by JUSTICE MARSHALL and myself) used fewer words: "it is monstrous that courts should aid or abet the law-breaking police officer." *Harris* v. *New York*, 401 U. S. 222, 232 (dissenting).

These standards are at war with the Government's claim that intelligence agencies may invoke the aid of the courts in order to compound their neglect of constitutional values. To be sure, at some point taint may become so attenuated that ignoring the original blunder will not breed contempt for law. But here judges are not asked merely to overlook infractions diminished by time and independent events. Rather, if these witnesses' allegations are correct, judges are being invited to become the handmaidens of intentional [5] police lawlessness by ordering these victims to elaborate on their telephonic communications of which the prosecutors would have no knowledge but for their unconstitutional surveillance.

In summary, I believe that *Silverthorne* was rightly decided, that it was rooted in our continuing policy to equip victims of unconstitutional searches with effective means of redress, that it has enjoyed repeated praise in subsequent decisions, that it has not been seriously challenged here, and that it requires that we affirm the Third Circuit in *Egan* and *Walsh* and reverse the Ninth Circuit in *Gelbard* and *Parnas*.

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[5] As Justice Fortas said, wiretapping "is usually the product of calculated official decision rather than the error of an individual agent of the state." *Alderman* v. *United States*, 394 U. S. 165, 203.

SUPREME COURT OF THE UNITED STATES

Nos. 71–110 AND 71–263

David Gelbard and Sidney Parnas, Petitioners, 71–110 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
United States, Petitioner, 71–263 *v.* Jogues Egan and Anne Elizabeth Walsh.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 26, 1972]

MR. JUSTICE WHITE, concurring in the Court's opinion and judgment.

Under 28 U. S. C. § 1826 (a) a witness who refuses to testify "without just cause" may be held in contempt of court. Here, grand jury witnesses are involved, and the just cause claimed to excuse them is that the testimony demanded involves the disclosure and use of communications allegedly intercepted in violation of the controlling federal statute and hence inadmissible under 18 U. S. C. § 2515.

The United States asserts that § 2515 affords no excuse to grand jury witnesses under any circumstances. Reliance is placed on § 2518 (10)(a) and the legislative history of the statute. I agree with the Court, however, that at least where the United States has intercepted communications without a warrant in circumstances where court approval was required, it is appropriate in construing and applying 28 U. S. C. § 1826 not to require the grand jury witness to answer and hence further the plain policy of the wiretap statute. This unquestionably works a change in the law with respect to the rights

of grand jury witnesses, but it is a change rooted in a complex statute the meaning of which is not immediately obvious as the opinions filed today so tellingly demonstrate.

Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and in any event, the deterrent value of excluding the evidence will be marginal at best. It is well, therefore, that the Court has left this issue open for consideration by the District Court on remand. See n. 22, p. —, *ante*.

Of course, where the Government officially denies the fact of electronic surveillance of the witness, the matter is at an end and the witness must answer.

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[June 26, 1972]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE POWELL join, dissenting.

Disposition of this case depends on the sorting out of admittedly conflicting implications from different sections of the principal statute involved. The Court's conclusion, while supportable if regard be had only for the actual language of the sections, is by no means compelled by that language. Its conclusion is reached in utter disregard for the relevant legislative history, and quite without consideration of the sharp break which it represents with the historical *modus operandi* of the grand jury. It is, in my opinion, wrong.

The Court states the question to be whether witnesses threatened with contempt under 28 U. S. C. § 1826 (a) "are entitled to invoke this prohibition of § 2515 as a defense to contempt charges brought against them for refusing to testify." *Ante*, p. 2. The question as thus framed by the Court has been so abstracted and refined, and divorced from the particulars of these two cases, as to virtually invite the erroneous answer which the opinion of the Court gives.

Nor is it accurate to "assume" as the Court does that the Government's overhearing of these witnesses was in violation of the applicable statute. Petitioner Gelbard contended in the trial court that the United States planned to use his electronically overheard conversations as one basis for questioning him before the grand jury, and so stated in a presentation to that court. The Government in a reply affidavit stated that whatever information had been gathered as a result of electronic overhearing had been obtained from wiretaps conducted pursuant to court order as provided in 18 U. S. C. § 2518.[1] Parnas, so far as this record shows, made no similar allegation in the trial court. The Court of Appeals in its opinion described the position taken by these witnesses in the following language:

> "When cited for contempt in the district court, each attacked the constitutional validity of § 2518, and additionally urged that he should not be required to testify until and unless first allowed to inspect all applications, orders, tapes and transcripts relating to such a electronic surveillance and afforded an opportunity to suppress the use before the grand jury of any evidence so secured . . . ."

Thus what was presented to the trial court in this proceeding under 18 U. S. C. § 1826 (a) was not a neatly stipulated question of law, but a demand by the petitioners that they be permitted to roam at will among the prosecutor's records in order to see whether they

[1] In the case of respondents Egan and Walsh, the government in the District Court did not state whether it had engaged in electronic surveillance. In this Court, however, the government represented that respondents Egan and Walsh had not been subjected to electronic surveillance. In light of this development, I would remand these cases to the District Court in order to give the respondents another opportunity to testify.

might be able to turn up any evidence indicating that the Government's overhearing of their conversations had been unauthorized by statute. In order to determine whether this particular type of remedy is open to these petitioners at this particular stage of potential criminal proceedings it is not enough to recite, as the Court does, that 18 U. S. C. § 2515 prohibits the use of illegally overheard wire communications before grand juries as well as before other governmental bodies. This proposition is not disputed. The far more difficult inquiry posed by these facts is whether the granting to these petitioners at this particular stage of these proceedings of sweeping discovery as a prelude to a full hearing on the issue of alleged unlawful surveillance can fairly be inferred from the enactment by Congress of the two statutes relied on in the Court's opinion.

I

It may be helpful at the outset to treat briefly the background of 28 U. S. C. § 1826 (a). As the Court notes, this provision was enacted as a part of the Organized Crime Control Act of 1970, and the Senate Report states that it was intended to codify the "existing practice of the federal courts." The existing practice of the federal courts prior to the enactment of this section was based on Fed. Rules Crim. Proc. 42 and on 18 U. S. C. § 401, both of which dealt generally with the power of courts to punish for contempt. The enactment of § 1826 (a) appears to have resulted from a desire on the part of Congress to treat separately from the general contempt power of courts their authority to deal with recalcitrant witnesses in court or grand jury proceedings. Since, as the Senate Report states, the enactment of this provision was designed to "codify the existing practice" it is instructive to note the types of claims litigated in connection with grand jury matters

under Rule 42 and 18 U. S. C. § 401 prior to the enactment of this new section. So far as the reported decisions of this Court and of the lower federal courts reveal, prior litigation with respect to grand juries has dealt almost exclusively with questions of privilege, and most of these cases have dealt with issues of the privilege against self-incrimination. While it is plain that the respondent in such proceedings was entitled to a hearing and to adduce evidence, it is equally plain that the typical hearing was short in duration and largely devoted to the arguments of counsel on an agreed statement of facts.[2]

Some of the flavor of the type of proceeding contemplated under the prior practice is gleaned from the following passage in the Court's opinion in *Shillitani* v. *United States*, 384 U. S. 364, 370 (citations omitted):

> "There can be no question that courts have an inherent power to enforce compliance with their lawful orders to civil contempt . . . . And it is essential that courts be able to compel the appearance and testimony of witnesses . . . . A grand jury subpoena must command the same respect . . . . Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance . . . ."

These proceedings seem almost invariably to have been short and summary in nature, not because the defendant was to be denied a fair hearing, but because the type of issue that could be raised at such a proceeding was one which did not generally permit extensive factual development. Even where a court of appeals

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[2] See, *e. g.*, *Blau* v. *United States*, 340 U. S. 159 (1950); *Rogers* v. *United States*, 340 U. S. 367 (1951); *Curcio* v. *United States*, 354 U. S. 118 (1957); *United States* v. *George*, 444 F. 2d 310 (CA6 1971); *In re October 1969 Grand Jury*, 435 F. 2d 350 (CA7 1970).

reversed a contempt adjudication because of the district court's failure to allow the defendant to testify on his own behalf with respect to material issues, there was no hint of either the right to, or the necessity for, any discovery proceedings against the Government. *Hooley v. United States*, 209 F. 2d 219 (CA1 1954).

Congress was of course free to expand the scope of inquiry in these proceedings, to enlarge the issues to be tried, and to alter past practice in any other way that it chose consistently with the Constitution. But in view of the stated congressional intent to "codify existing practice" by the enactment of § 1826 (a), we should require rather strong evidence of congressional purpose to conclude that Congress intended to engraft on the traditional and rather summary contempt hearings a new type of hearing in which a grand jury witness is accorded *carte blanche* discovery of all of the Government's "applications, orders, tapes, and transcripts relating to electronic surveillance" before he may be required to testify.

II

Just as Congress was not writing on a clean slate in the area of contempt hearings, it was not writing on a clean slate with respect to the nature of grand jury proceedings. These petitioners were called before a grand jury that had been convened to investigate violations of federal gambling laws. We deal, therefore, not with the rights of a criminal defendant in the traditional adversary context of a trial, but with the status of witnesses summoned to testify before a body devoted to sifting evidence that could result in the presentment of criminal charges. Just as the cases arising under the predecessor of 28 U. S. C. § 1826 (a) suggest a limitation on the type of issue which may be litigated in such a proceeding, cases dealing with the role of the grand jury stress the unique breadth of its scope of in-

quiry. In *Blair* v. *United States*, 250 U. S. 273, 281–282 (1919), this Court defined the vital investigatory function of the grand jury:

> "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning . . . ."

Another passage from *Blair* pointed out the citizen's obligation to obey the process of the grand jury:

> "It is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the government is bound to perform upon being properly summoned." *Id.*, at 281.

In *Costello* v. *United States*, 350 U. S. 359, 362 (1956), the Court traced the development of the English grand jury and concluded that the probable intent of the Framers of our Constitution was to parallel that institution as it had existed in England where "grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules." 350 U. S., at 362. The Court in *Costello* was at pains to point out the necessity of limiting the nature of challenges to evidence adduced before a grand jury if that body were to retain its traditional comprehensive investigative authority:

> "If indictments were to be held open to challenge on the ground that there was inadequate or incom-

> petent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on the kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury." 350 U. S., at 363.

While this general statement applied by its terms only to one who was ultimately indicted by the grand jury, its reasoning applies with like force to one who seeks to make an evidentiary challenge to grand jury proceedings on the basis of his status as a prospective witness. Indeed, time-consuming challenges by witnesses during the course of a grand jury investigation would be far more inimical to the function of that body than would a motion to dismiss an indictment after it had concluded its deliberations.

In *Lawn* v. *United States*, 355 U. S. 339, the Court refused to accord to petitioners the hearing, prior to trial, on the issue of whether or not a grand jury which indicted them had made direct or derivative use of materials the use of which by an earlier grand jury had been held to violate the defendant's privilege against self-incrimination. In supporting its conclusion that the defendant should not even be accorded a hearing to sustain these contentions, the Court quoted a passage from *Costello* describing the grand jury as

> "[an] institution, in which laymen conduct their inquiry unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change. In a trial on the merits, defendants are entitled to a strict observance of all the rules designed to bring about a fair verdict. Defendants are not entitled, however, to a rule which would result in interminable delay but add nothing to the assurance of a fair trial." 355 U. S., at 350.

It seems to me to be clear beyond cavil from these cases that prior to the enactment of the Omnibus Crime and Safe Streets Act of 1968, a hearing such as that which the Court awards these petitioners was not only unauthorized by law, but completely contrary to the ingrained principles which have long governed the functioning of the grand jury.

III

When Congress set out to enact the two statutes on which the Court relies, it was certainly not with any announced intent to change the nature of contempt hearings relating to grand jury proceedings, or to change the *modus operandi* of the grand jury. Instead, largely in response to the decisions of this Court in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967), Congress in 1967 undertook to draft comprehensive legislation both authorizing the use of evidence obtained by electronic surveillance on specified conditions, and prohibiting its use otherwise. S. Rep. No. 1097, 90th Cong., 2d Sess., 67. The ultimate result was the Omnibus Act of 1968. Critical to analysis of the issue involved here are §§ 2515 and 2518 (10) (a) of that Act, which provide in pertinent part as follows:

> "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority . . . if the disclosure of that information would be in violation of this chapter. § 2515.
>
> "Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of

the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was interpreted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval . . . ." § 2518 (10)(a).

Here is presented at the very least an implied conflict between two separate sections of the same Act. Section 2515 proscribes generally the use of unlawfully intercepted communications as evidence before a number of specified bodies, including a grand jury. Section 2518 (10)(a) provides for the type of hearing which petitioners sought and were denied by the District Court; it provides such hearings in connection with a number of specified legal proceedings, but it conspicuously omits proceedings before a grand jury. The method by which the Court solves this dilemma is to state that if petitioners succeed after their discovery in establishing their claim of unlawful electronic surveillance, their questioning before the grand jury on the basis of such electronic surveillance would violate § 2515, as of course it presumptively would. Therefore, says the Court, petitioners *must* be entitled to the discovery and factual hearing which they seek, even though § 2518 (10)(a) rather clearly denies it to them by implication.

A construction which I believe at least equally plausible, based simply on the juxtaposition of the various sections of the statute, is that § 2515 contains a basic proscription of certain conduct, but does not attempt to specify remedies or rights arising from a breach of

that proscription; the specification of remedies is left to other sections. Other sections provide several remedies; criminal and civil sanctions are imposed by §§ 2511 and 2520, whereas § 2518 (10)(a) accords a right to a suppression hearing in specified cases. Thus the fact that one who may be the victim of alleged unlawful surveillance on the part of the Government is not accorded an *Alderman*-type suppression hearing under the provisions of § 2518 (10)(a) is not left remediless to such a degree that it must be presumed to have been an oversight; he is remitted to the institution of civil proceedings, or the filing of a complaint leading to the institution of a criminal prosecution. While the latter two remedies may not be as efficacious in many situations as a suppression hearing, the remission of an aggrieved party to those remedies certainly does not render nugatory the general proscription contained in § 2515.

The omission of "grand jury" from the designated forums in § 2518 (10)(a) is not explainable on the basis that though the testimony is sought to be adduced before a grand jury, the motion to suppress would actually be made in a court, which is one of the forums designated in § 2518 (10)(a). The language "in any trial, hearing, or proceeding before" quite clearly refers to the forum in which the testimony is sought to be adduced. But even more significant is the inclusion among the designated forums of "department" "officer" "agency" and "regulatory body." Congress has almost without exception provided that issues as to the legality and propriety of subpoenas issued by either agencies or executive departments should be resolved by the courts. It has accomplished this result by requiring the agency to bring an independent judicial action to enforce obedience to its subpoena. See, *e. g.*, 15 U. S. C. § 79 (r) Utility Holding Company Act; 15 U. S. C. § 78 (u) Securities Exchange Act; 41 U. S. C. § 35–45 Walsh-Healy Public Contracts

Act; 50 U. S. C. App. 2155 Defense Production Act of 1950; 47 U. S. C. § 49 Communications Act; 46 U. S. C. § 1124 Merchant Marine Act of 1946; 26 U. S. C. § 7604 Internal Revenue Act; 16 U. S. C. § 825 (f)(c) Electric Utility Companies Act; 15 U. S. C. § 717 (m)(d) Natural Gas Act; 7 U. S. C. § 511 (n) Tobacco Inspection Act. This general mode of enforcement of agency investigative subpoenas was discussed in the context of the Fair Labor Standards Act in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946).

Thus if Congress in § 2518 had intended to focus on the forum in which the hearing as to the legality of the subpoena is to be determined, rather than the forum in which the testimony is sought to be adduced, it would have omitted not only grand juries, but departments, officers, agencies, and regulatory bodies as well from the coverage of § 2518 (10)(a). For questions as to the legality of subpoenas issued by all these bodies are resolved in the courts. By omitting only grand juries in § 2518, Congress indicated that it was dealing with the forum in which the testimony was sought to be adduced, and that the suppression hearing authorized by the section was not to be available to grand jury witnesses.

In the light of these conflicting implications from the statutory language itself, resort to the legislative history is appropriate. Passages from the legislative history cited by the Court in its opinion do not focus at all on the availability of a suppression hearing in grand jury proceedings; they simply speak in general terms of the congressional intent to prohibit and penalize unlawful electronic surveillance, of which intent there can of course be no doubt. But several parts of the legislative history address themselves, far more particularly than any relied upon by the Court in its opinion, to the actual issue before us. The Senate Report, for example,

indicates as plainly as possible that the exclusion of grand juries from the language of § 2518 (10)(a) was deliberate:

> "This provision [§ 2518 (10)(a)] must be read in connection with §§ 2515 and 2517, discussed above, *which it limits.* It provides the remedy for the right created by § 2515. Because no person is a party as such to a grand jury proceeding, the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. (*Blue* v. *United States*, 384 U. S. 251 (1965).) There is no intent to change this general rule. It is the intent of the provision only that when the motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding." (Emphasis added.) S. Rept. No. 1097, 90th Cong., 2d Sess., 106.

There is an intimation in the opinion of the Court that the reason this language was used may have been that grand juries do not pass upon motions to suppress, while courts do. This intimation is not only inconsistent with the language of the section itself, as pointed out, *ante*, p. 13, but it attributes to the drafters of the report a lower level of understanding of the subject matter with which they were dealing than I believe is justified. It is also rather squarely contradicted by the statement that there is no limitation on the character of evidence that may be presented to a grand jury "which is enforceable by an individual." Had the report meant to stress the presumably well-known fact that grand juries do not themselves grant motions to suppress, it would not have

used that language, nor would it have cited *Blue* v. *United States, supra.*

The fact that the report states the reason for the policy adopted in terms of the rights of an "individual," rather than in terms of the rights of a "defendant," makes the Court's discussion of the doctrine of various cases, *ante,* pp. 17–18, of doubtful help in construing the statute. Whatever *Blue* v. *United States, supra,* may be said to "hold" after careful analysis by this Court, the drafters of the Senate Report undoubtedly took it to stand for the proposition for which they cited it. As stated by Mr. Justice Frankfurter, concurring in *Green* v. *United States,* 356 U. S. 165, 189:

> "The fact that scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded hardly wipes out a century and a half of the legislative and judicial history of federal law based on such assumptions."

Not only does the report dealing with § 2518 (10)(a) make clear that it is to be construed in connection with § 2515, which it limits, but the section of the same report dealing with § 2515 re-emphasizes this conclusion. Speaking of the latter section, the report says:

> "This provision must, of course, be read in light of § 2518 (10)(a) discussed below, which defines the class entitled to make a motion to suppress. It largely reflects existing law . . . . Nor generally [is there any intention] to press the scope of the suppression rule beyond present search and seizure law. See *Walder* v. *United States,* 347 U. S. 62 (1954) . . . . The provision thus forms an integral part of the system of limitations designed to protect privacy. Along with the criminal and

> civil remedies, it should serve to guarantee that the standards of the new chapter will sharply curtail the unlawful interception of wire and oral communications."

The conclusion that § 2518 (10)(a) is the exclusive source of the right to move to suppress is further fortified by the Senate Report's comment on § 2510 (11) of the Act, which defines an "aggrieved person" as one who is a party to an "interception of wire or oral communication or a person against whom the interception was directed." The Senate Report, page 91, states:

> "This definition defines the class of those who are entitled to invoke the suppression sanction of § 2515 discussed below, *through the motion to suppress provided for by § 2518 (10)(a), also discussed below.* It is intended to reflect existing law. (Citations omitted.) (Emphasis added.)

Finally, § 2518 (9) requires the Government to provide to each party to "any trial, hearing or other proceeding" a copy of the court order authorizing surveillance if the Government intends to use the fruits thereof. The Senate Report, p. 105, states:

> " 'Proceedings' is intended to include all adversary type hearings . . . . It would not include a grand jury hearing. Compare *Blue* v. *United States* (citation omitted)."

If § 2515 of the Omnibus Act of 1968 stood alone without any informative legislative history, the Court's conclusion with respect to the rights of these petitioners would be plainly correct. If the conflicting implications from two sections of the same statute were present in a regulatory scheme which was to stand by itself, rather than to be superimposed on procedures such as contempt hearings and institutions such as the grand

jury, the Court's conclusion would at least be tenable. But when the Court concludes that Congress, almost in a fit of absentmindedness, has drastically enlarged the right of potential grand jury witnesses to avoid testifying, and when such a conclusion is based upon one of two ambivalent implications from the language of the statute, and is contrary to virtually every whit of legislative history addressed to the point in issue, I think its conclusion is plainly wrong.

IV

The Court seeks to bolster its reasoning by reliance upon 18 U. S. C. § 3504 (a)(1), which was a part of the Organized Crime Act of 1970. That section provides in pertinent part as follows:

> "In any . . . proceeding entered before any . . . grand jury . . . .
>
> "(1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act."

Assuming, *arguendo*, that this section does apply to these petitioners, the record in the District Court and the opinion of the Court of Appeals clearly shows that only Gelbard made what might be called a "claim" within the language of the section, and that the Government in its response did "affirm or deny" the occurrence of the alleged unlawful act; in fact, the Government denied the occurrence of the unlawful act. This should be sufficient for disposition of the case as to these petitioners.

The Court, without giving much guidance to those who would seek to follow the path by which it reaches

the conclusion, concludes that this section "confirms that Congress meant that grand jury witnesses might defend contempt charges by invoking the prohibition of § 2515 against the compelled disclosure of evidence obtained in violation of Title III." If the Court means to say any more than that under the circumstances specified in § 3504, the Government must affirm or deny, I am at a loss how it extracts additional requirements from the language used by Congress in that section.

But even if the Court were correct in deciding that § 3504 (a)(1) requires more than it says of the Government, I believe the Court errs in deciding that this section applies at all to these petitioners. Section 3504 as enacted actually consists of two parts, A and B. Part A is a series of findings by Congress, reading as follows:

> "The Congress finds that claims that evidence offered in proceedings was obtained by the exploitation of unlawful acts, and is therefore inadmissible in evidence, (1) often cannot reliably be determined when such claims concern evidence of events occurring years after the allegedly unlawful act, and (2) when the allegedly unlawful act has occurred more than five years prior to the event in question, there is virtually no likelihood that the evidence offered to prove the event has been obtained by the exploitation of that allegedly unlawful act."

House Report No. 91–1549 (to accompany S. 30) contains this comment on Part A:

> "This section contains a special finding relating, *as do the following sections of the Title* to certain evidentiary problems created by electronic surveillance conducted by the government *prior to the enactment of Public Law 90–351 on June 19, 1968,* which provided statutory authority for obtaining surveillance warrants in certain types of criminal

investigations." (Emphasis supplied.) 2 U. S. Code Cong. & Adm. News (91st Cong., 2d Sess., 1970), at 4026.

The same report, in its introductory discussion of Title VII, contains the following statement:

"Title VII intends to limit disclosure of information illegally obtained by the government to defendants who seek to challenge the admissibility of evidence because it is either the primary or indirect production of such an illegal act. The Title also prohibits any challenge to the admissibility of evidence based on its being the fruit of an unlawful governmental act, if such act occurred five years or more before the events sought to be proved. As amended by the committee, the application of Title VII is *limited* to federal judicial and administrative proceedings, and *to electronic or mechanical surveillance which occurred prior to June 19, 1968*, the date of enactment of the Federal Wiretapping and Electronic Surveillance law." (Chapter 119, Title XVII, U. S. Code.) (Emphasis supplied.)

The Senate Report, too, casts § 3504 (a)(1) in quite a different light from that in which the Court puts it:

"Lastly, it should be noted that nothing in § 3504 (a)(1) is intended to codify or change present law defining illegal conduct or prescribing requirements for standing to object to such conduct or the use of evidence given under an immunity grant. See, *e. g.*, *Giordano* v. *United States*, 394 U. S. 310 (1969); *Alderman* v. *United States*, 394 U. S. 165 (1969). *Nevertheless, since it requires a pending claim as a predicate to disclosure, it sets aside the present wasteful practice of the Department of Justice in searching files without a motion from the defendant . . .*" (Emphasis supplied.)

These conclusions in the Senate Report are supported by statements of the bill's managers in the House during the time it was being debated. Congressman Poff explained Title VII as follows:

> "Title VII would, first, reverse the Supreme Court's decision in *Alderman* v. *United States,* 394 U. S. 165 (1969) requiring, under its supervisory power, the disclosure of government files in criminal trials and . . . would, second, set a five-year statute of limitations on inserting issues dealing with 'fruit of the poisonous tree' in similar cases." 116 Cong. Rec., 91st Cong., 2d Sess., 35192, Oct. 6, 1970.

Congressman Celler explained the amendments incorporating the June 18, 1968, time limitation into subsections (a)(2) and (a)(3) of § 3504 that had been made by a subcommittee of the House Judiciary Committee in these words:

> "As amended by the committee, the application of Title VII is limited to federal judicial and administrative proceedings, and to electronic surveillance which occurred prior to June 19, 1968, the date of enactment of the Federal Wiretapping and Electronic Surveillance law—Chapter 119, Title XVII, United States Code." *Id.,* at 35196.

Even more specific was the explanation of the amendment made by Congressman Poff on the floor of the House after the time provisions had been included:

> "TITLE VII — LITIGATION CONCERNING SOURCES OF EVIDENCE
>
> "Mr. Chairman, Title VII of the Organized Crime Control Act is designed to regulate motions to suppress evidence in certain limited situations where the motion is based upon unlawful electronic eavesdropping or wiretapping *which occurred prior to the*

enactment of the Federal Electronic Surveillance laws on June 19, 1968 . . . .

"Where there was in fact an unlawful overhearing prior to June 19, 1968, the title provides for an in camera examination of the Government's transcripts and records to determine whether they may be relevant to the claim of inadmissibility. . . . To the extent that the court is permitted to determine relevancy in an ex parte proceeding, the title will modify the procedure established by the Supreme Court in *Alderman* v. *United States* [citation omitted].

"*As I have indicated, the title applies only to disclosures where the electronic surveillance occurred prior to June 19, 1968.* It is not necessary that it apply to disclosure *where an electronic surveillance occurred after that date,* because *such disclosure will be mandated not by Alderman, but by section 2518 of Title 18,* United States Code, added by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Section 2518 (10)(e) [*sic*] provides a specific procedure for motions to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted, that the authorization for the interception was insufficient, or that the interception was not made in conformity with the authorization obtained. It provides, insofar as the disclosure of intercepted communications is concerned, that upon the filing of a motion to suppress by an aggrieved person the trial judge may in his discretion make available to such person and his counsel for inspection such portions of an intercepted communication, or evidence derived therefrom, as the judge

determines to be in the interest of justice—see Senate Report No. 1097, 90th Cong., 2d Sess. 106, 1968. *The provisions of this title will, therefore control the disclosure of transcripts of electronic surveillances conducted prior to June 19, 1968. Thereafter, existing law, not Alderman will control.* Consequently, *in view of these amendments to* Title VII, its enactment, in conjunction with *the provisions of Title III of the 1968 Act, provides the Federal Government with a comprehensive and integrated set of procedural rules governing suppression litigation concerning electronic surveillance." Id.*, at 35293–35294. (Emphasis added.)

The weight of the findings actually enacted by Congress in Part A and the uniform tenor of the legislative history outweights, in my opinion, the ambiguity arising from the failure to actually include a cutoff date in § 3504 (a)(1).

Section 3504 (a)(1) by its terms, even if read totally out of their context and background, as the Court seeks to do, affords these petitioners no help because the Government has complied with its requirements in these cases. But more importantly, the entire thrust of the findings actually adopted by Congress, and of the reports of both Houses, make it as plain as humanly possible that this section was intended as a *limitation* on existing rights of criminal defendants, not as an *enlargement* of them. Congress, displeased with the effect of this Court's decision in *Alderman, supra,* desired to put a statute of limitations type cut-off beyond which the Government would not be required to go in time in order to disprove taint. Equally displeased with the policy adopted by the Government of searching its files for evidence of taint even when none had been alleged by the defendant, it sought to put a stop to that prac-

tice by requiring the Government to "affirm or deny" only where there is "a claim by a party aggrieved that evidence is inadmissible." Understanding of this background not only affords a complete explanation of the language used by Congress in this section, but illustrates the palpable error into which the Court has fallen in construing it. The Court has at least figuratively stood on its head both the language and the legislative history of this section in order to conclude that it was intended to expand the rights of criminal defendants.

V

Neither the Omnibus Crime and Safe Streets Act of 1968 nor the Organized Crime Act of 1970, when construed in accordance with the canons of statutory construction traditionally followed by this Court, support the expansive and novel claims asserted by these petitioners. The Court having reached a contrary conclusion, I respectfully dissent.